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18 Aug 1812

# L A W S

OF

## Trade and Commerce,

DESIGNED AS

A BOOK OF REFERENCE

IN

MERCANTILE TRANSACTIONS.

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Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEG.

It is incumbent upon every man to be acquainted with those laws, at least, with which he is immediately concerned.

BLACKSTONE'S COMMENTARIES.

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By JOHN WILLIAMS, Esq.

Of the Inner Temple.

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L O N D O N :

PRINTED FOR SHERWOOD, NEELY, AND JONES,

PATERNOSTER-ROW ;

AND THOMSON AND WRIGHTSON, BIRMINGHAM ; BRODIE, DOWDING, AND LUXFORD, SALISBURY ; MEYLER AND SON, BATH ; REES AND CURTIS, PLYMOUTH, W. ROBINSON, LIVERPOOL ; MOTLEY, MILLER, AND HARRISON, PORTSMOUTH ; MUNDAY AND SLATTER, OXFORD ; CONSTABLE AND CO., EDINBURGH ; BRASS AND REID, GLASGOW ; AND CUMMINGS, DUBLIN.

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TO  
ALEXANDER BARING, Esq. M.P.

THIS WORK

IS,

BY PERMISSION,

INSCRIBED:

AS A TESTIMONY OF ESTEEM

FOR HIS EXTENSIVE COMMERCIAL KNOWLEDGE

AND

ACKNOWLEDGED PRIVATE WORTH,

BY

HIS MUCH OBLIGED

AND

MOST OBEDIENT SERVANT,

THE AUTHOR.



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## INTRODUCTION.

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THE importance of Commerce is a point so generally understood and acknowledged, that it would be superfluous to attempt any new proof or illustration of its necessity or advantages. It tends, says an elegant historian, to wear off those prejudices which maintain distinction and animosity between nations. It softens and polishes the manners of men. It unites them by one of the strongest of all ties, the desire of supplying their mutual wants. It disposes them to peace, by establishing in every state an order of citizens bound by their interest to be the guardians of public tranquillity.

From a view of the beneficial effects which commerce is capable of producing on the happiness and comfort of mankind, it is a natural inference, that the means by which it may be most successfully cultivated, as also those established rules and principles which regulate nations in their commercial dealings with each other, must be the object

ject of the most solicitous inquiry of every one whose interests and pursuits are of a mercantile nature. But experience proves the contrary. So far from a knowledge of the principles of political œconomy, and their practical application to commerce and finance, of those laws and customs which universal consent, or the more obligatory authority of compacts or treaties, has established for the commercial intercourse of independent states, being thought necessary, there are few men engaged in commerce who have any notion of the privileges, regulations, and restrictions of the municipal laws of their native soil with regard to commercial affairs. The reason is obvious. The statutory enactments and judicial decisions concerning the regulation of commerce, have become so numerous, and are oftentimes so fluctuating, as to preclude all, except such as devote themselves to the attainment of legal knowledge for professional purposes, from an acquaintance with their provisions. It must also be admitted, that those to whom, from their destination in life, this knowledge is accessible, appear not to have been very solicitous to remove this obstacle. From the few publications which, until of late years, have appeared on commercial branches of the law, it would seem that professional men had formed the same opinion of their clients' capabilities of understanding the mysteries of law, as Erasmus did of the capacity of those who happened not to be born to a splendid fortune and liberal education, with regard  
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to the truths of religion—"Non expedit omnem veritatem," says that great divine in one of his letters to Melancthon, "prodere vulgo." Within the last twenty or thirty years, however, several valuable treatises on commercial law have been published; but as these are numerous, and chiefly calculated for professional readers, little advantage or assistance can be derived from them to the mercantile part of the community.

To obviate this defect, then, is the design of the present publication. Its object is to afford a compendium of commercial law applicable to subjects of frequent recurrence, and digested in a form to which reference can readily be made in the hurry of business. With what skill the design has been executed, the compiler does not take upon himself to determine. In treating of so great a variety of subjects, if he has failed, his consolation is, that his endeavours were well meant. On a review of his work, he readily acknowledges that he is not satisfied with its execution. When he first sat down to his task, he expected to have constructed a much more goodly fabric than he finds he has done. His disappointment, however, has forcibly convinced him, that "the distance is always very great between actual performance and speculative probability." To those who are disposed to be captious, he replies in the words of Columella,

"Nihil perfectum, aut a singulari consummatum industria."

The Compiler avails himself, here, of the opportunity of acknowledging his obligations to the excellent works on Commercial Law by the following gentlemen, viz. James Allen Park, Charles Abbot, William Cooke, Francis Whitmarsh, William Watson, Walter William Fell, William Paley, William Selwyn, Joseph Chitty, and George Ross, esquires.

5, Hare Court, Temple,

July 1, 1812.

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THE  
L A W S  
OF  
TRADE AND COMMERCE.

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PART I.

AN HISTORICAL SKETCH OF THE RISE AND PROGRESS  
OF COMMERCE.

NOTWITHSTANDING Xenophon expresses a doubt whether commerce be of any advantage to a state (*Εἶδε καὶ ἔμπορία ὄφελει τι πόλιν, &c.*), and that Plato (*De Leg. lib. 4.*) totally excludes it from his imaginary commonwealth; yet whoever looks into the history of the world will find, that in all ages its utility and advantages have been fully appreciated by mankind. It is an observation justified by experience, that as soon as the commercial spirit begins to acquire vigour, and to gain the ascendant in any society, we discover a new genius in its policy, its alliances, its wars, and its negotiations. No nation that cultivated foreign commerce ever failed to make a distinguished figure on the theatre of the world. It was by its opulence and extensive commerce that Carthage counterbalanced the fortune and the grandeur of the Romans; and in proportion as commerce made its way into the various states of Europe, they turned their attention to those objects and adopted those manners which distinguish polished nations, and which lead to political consequence and eminence amongst the neighbouring powers<sup>1</sup>.

<sup>1</sup> Robertson's View of Society, p. 95.

Among the ancients, the Rhodians, the Egyptians, the Phenicians, and the Carthaginians, were the nations which cultivated commerce the most successfully, and obtained by its resources riches and renown.

The Rhodians claim the first place in this inquiry; for although there is undoubted testimony, that nations of much greater antiquity than the people of Rhodes<sup>1</sup> cultivated commerce, and carried it on to a considerable extent, yet there does not appear to be the smallest ground for entertaining an opinion that any of these naval powers had established amongst themselves, much more communicated to mankind in general, any code or system of marine law. Rhodes obtained the sovereignty of the sea about 916 years before the Christian era. The situation and fertility of this island were peculiarly favourable for the purposes of navigation, being situated in the Mediterranean seas, a few leagues from the continent of Lesser Asia; and its wealth and fertility have always been celebrated by the poets and historians of antiquity. From these circumstances, joined to the activity and industry of its people, it long maintained that superiority which it had acquired; its inhabitants were rich, its alliance was courted; though, upon principles of policy, it generally observed a strict neutrality. But as wealth naturally produces luxury, which gradually enervates the powers of the state, the Rhodians, after maintaining their political importance from the time already mentioned till the termination almost of the Roman republic, visibly began to decline in wealth and power<sup>2</sup>.

The Egyptians, soon after the establishment of their mo-

<sup>1</sup> Eusebius, in his account of the maritime states, mentions three anterior to the Rhodians; namely, the Cretans, the Lydians, and the Thracians; the first of whom flourished about five hundred years before the Rhodians, the next two hundred, and the last about eighty years. Euseb. Chronicon, lib. 2.

<sup>2</sup> Park's Insurance, p. 5.



narchy, are said to have opened a trade between the Arabian Gulf and the Red Sea and the western coast of the great Indian continent. The commodities which they imported from the East were carried by land from the Arabian Gulf to the banks of the Nile, and conveyed down that river to the Mediterranean. But if the Egyptians, in early times, applied themselves to commerce, their attention to it was of short duration. The fertile soil and mild climate of Egypt produced the necessities and comforts of life in such profusion, as rendered the inhabitants so independent of other countries, that it became an established maxim among that people, whose ideas and institutions differed in almost every point from those of other nations, to renounce all intercourse with foreigners. In consequence of this, they never went out of their own country; they held all seafaring persons in detestation, as impious and profane; and, fortifying their own harbours, they denied strangers admittance into them. It was in the decline of their power, and when their veneration for ancient maxims had greatly abated, that they again opened their ports, and resumed their communication with foreigners<sup>1</sup>.

The character and situation of the Phenicians were as favourable to the spirit of commerce and discovery as those of the Egyptians were adverse to it. They had no distinguishing peculiarity in their manners and institutions; they were not addicted to any singular and unsocial form of superstition; they could mingle with other nations without scruple and reluctance. The territory which they possessed was neither large nor fertile. Commerce was the only source from which they could derive opulence and power. Accordingly the trade carried on by the Phenicians of Sidon and Tyre was more extensive and enterprising than that of any state in the ancient world. The genius of the Pheni-

<sup>1</sup> Robertson's History of America, vol. i.

cians, as well as the object of their policy, and the spirit of their laws, was entirely commercial. They were a people of merchants, who aimed at the empire of the sea, and actually possessed it. Their ships not only frequented all the ports of the Mediterranean, but they were the first who ventured beyond the ancient boundaries of navigation<sup>1</sup>, and, passing the straits of Gades, visited the coasts of Spain and Africa. In many of the places to which they resorted they planted colonies, and communicated to the rude inhabitants some knowledge of their arts and improvements. While they extended their discoveries to the north and the west, they did not neglect to penetrate into the more opulent and fertile regions of the south and east. Having rendered themselves masters of several commodious harbours towards the bottom of the Arabian Gulf, they, after the example of the Egyptians, established a regular intercourse with Arabia and the continent of India on the one hand, and with the eastern coast of Africa on the other. From these countries they imported many valuable commodities unknown to the rest of the world, and during a long period engrossed that lucrative branch of commerce without a rival<sup>2</sup>.

The vast wealth which the Phenicians acquired by monopolizing the trade carried on in the Red Sea incited their neighbours the Jews, under the prosperous reigns of David and Solomon, to aim at being admitted to some share of it. This they obtained, partly by their conquest of Idu-

<sup>1</sup> We are informed on the testimony of Herodotus, that a Phenician fleet, fitted out by Necho king of Egypt, took its departure, about six hundred years before the Christian era, from a port in the Red Sea, doubled the southern promontory of Africa, and, after a voyage of three years, returned by the straits of Gades to the mouth of the Nile. Lib. iv. c. 42. The account of this extraordinary navigation, Dr. Robertson justly observes, is of suspicious authority. It is recorded by the Greek and Roman writers rather as a strange amusing tale, which they did not comprehend, or did not believe, than as a real transaction which enlarged their knowledge and influenced their opinions.

<sup>2</sup> Robertson's History of America, vol. 1.

mea, which stretches along the Red Sea, and partly by their alliance with Hiram king of Tyre. Solomon fitted out fleets, which, under the protection of Phenician pilots, sailed from the Red Sea to Tarshish and Ophir. These, it is probable, were partly in India and Africa, which their conductors were accustomed to frequent; and from them the Jewish ships returned with such valuable cargoes as suddenly diffused wealth and splendour through the kingdom of Israel<sup>1</sup>. But the singular institutions of the Jews, the observance of which was enjoined by their divine legislator with an intention of preserving them a separate people uninfected by idolatry, formed a national character, incapable of that open and liberal intercourse with strangers which commerce requires. Accordingly this unsocial genius of the people, together with the disasters which befel the kingdom of Israel, prevented the commercial spirit, which their monarchs laboured to introduce and to cherish, from spreading among them<sup>2</sup>.

But though the instructions and example of the Phenicians were unable to mould the manners and temper of the Jews, in opposition to the tendency of their laws, they transmitted the commercial spirit with facility, and in full vigour, to their own descendants the Carthaginians. The commonwealth of Carthage applied to trade and to naval affairs with no less ardour, ingenuity, and success, than its parent state. Carthage early rivalled and soon surpassed Tyre in opulence and power, but seems not to have aimed at obtaining any share in the commerce with India. The Phenicians had engrossed this, and had such a command of the Red Sea as secured to them the exclusive possession of that lucrative branch of trade. The commercial acti-

<sup>1</sup> Witness the immense riches which David is recorded, in 1 Chronicles, chap. xxii. xxix. to have prepared for the house of the Lord.

<sup>2</sup> Robertson's History of America, vol. 1.

vity of the Carthaginians was exerted in another direction. Without contending for the trade of the East with their mother country, they extended their navigation chiefly towards the west and north. Following the course which the Phenicians had opened, they passed the straits of Gades, and, pushing their discoveries far beyond those of the parent state, visited not only all the coasts of Spain, but those of Gaul, and penetrated at last into Britain. At the same time that they acquired knowledge of the new countries in this part of the globe, they gradually carried their researches towards the south. They made considerable progress, by land, into the interior provinces of Africa, traded with some of them, and subjected others to their empire. They sailed along the western coast of that great continent, almost to the tropic of Cancer, and planted several colonies, in order to civilize the natives and accustom them to commerce. They discovered the Fortunate Islands, now known by the name of the Canaries, the utmost boundary of ancient navigation in the western ocean<sup>1</sup>.

Under the Grecian and Roman republics, history also discovers the traces of a commerce cultivated. In several of the states of Greece, particularly in Corinth and Athens, commerce very much flourished. Athens indeed was particularly famous for commercial knowledge; its trade was extensive, having a port to receive the merchandizes of Asia, and another, those of Italy; its manufactures were in high repute, and emulation was excited by the public rewards and honours which were bestowed upon those who attained to excellence in any of the useful arts. The many laws which this people have left to posterity, with regard to imports and exports, and the contract of bargain and sale; the many privileges granted to the mercantile part of the state; the appointment of magistrates who had the cognizance of con-

<sup>1</sup> Robertson's History of America, vol. 1.



troversies that happened between merchants and mariners ; the attention which they paid to their market, and the many officers concerned in that department, give us a very favourable idea of their judgment in the true principles of commerce. But notwithstanding these excellent laws and institutions, and the advantages arising from a numerous body of seamen which they had in their pay, from the produce of their mines, and from their influence over the other cities of Greece, the Athenians did not carry on so extensive a trade as might naturally be expected. They, as well as the other maritime states of Greece, hardly carried on any commerce beyond the limits of the Mediterranean Sea. Their chief intercourse was with the colonies of their countrymen planted in the Lesser Asia, in Italy, and Sicily. They sometimes visited the ports of Egypt, of the southern provinces of Gaul, and of Thrace ; or, passing through the Hellespont, they traded with the countries around the Euxine Sea. The commerce of the Romans was still more inconsiderable than that of the Greeks. They regarded commerce no further than as it was instrumental towards conquest. When Roman valour and discipline had subdued all the maritime states known in the ancient world ; when Carthage, Greece, and Egypt had submitted to their power, the Romans did not imbibe the spirit of the conquered nations. The trade of Greece, Egypt, and the other conquered countries, continued to be carried on in its usual channels, after they were reduced into the form of Roman provinces. As Rome was the capital of the world, and the seat of government, all the wealth and valuable productions of its provinces flowed naturally thither. The Romans, satisfied with this, seem to have suffered commerce to have remained almost entirely in the hands of the respective conquered countries. The extent, however, of the Roman power, which reached over the greatest part of  
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the known world, the vigilant inspection of the Roman magistrates, and the spirit of the Roman government, no less intelligent than active, gave such additional security to commerce as animated it with new vigour. The union among nations was never so entire, nor the intercourse so perfect, as within the bounds of this vast empire. Commerce, under the Roman dominion, was not obstructed by the jealousy of rival states, interrupted by frequent hostilities, or limited by partial restrictions. One superintending power moved and regulated the industry of mankind, and enjoyed the fruits of their joint efforts'.

But though the policy of the Greeks and Romans encouraged commerce, yet they did not possess a commercial spirit of enterprise. The Romans, in their manners, their constitution, and their laws, treated commerce as a dishonourable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune. Among that people of soldiers, to have applied to trade would have been a degradation of a Roman citizen. No employment was deemed honourable but the plough and the sword; every species of commercial pursuits was held in such slight estimation, that traders and mechanics were incapable of succeeding to any public honours. They abandoned the mechanical arts, commerce, and navigation, to slaves, to freedmen, to provincials, and to citizens of the lowest class. Even after the subversion of liberty, when the severity and haughtiness of ancient manners began to abate, commerce did not rise into high estimation among the Romans. In several of the ancient states of Greece, foreign trade was prohibited altogether; and in several others the employments of artificers and manufacturers were considered as

<sup>1</sup> Beawes's *Lex Merc.* Taylor's *Elements of the Civil Law*, 507. Potter's *Grecian Antiq.* vol. i. p. 80 et seq. Montesquieu's *Esprit des Loix*, liv. xxi. c. 7. Robertson's *History of America*, p. 16.

hurtful to the strength and agility of the human frame. Both at Athens and at Rome, if the citizens deigned to engage in traffic, it was carried on through the medium of slaves, who exercised it for the benefit of their masters. But this awkward shift of avoiding the odium of being engaged in trade was no less prejudicial to the interests of the respective communities, than their impolitic restraints upon the freedom of commerce: the wealth, power, and protection of the rich made it almost impossible for a poor freeman to find a market for his work, when it came into competition with that of the slaves<sup>1</sup>.

But to whatever degree of advancement commerce had attained in the countries under review, it visibly declined when the Roman empire was overrun by the Barbarians. During the first ages after the destruction of the mighty fabric of the Western empire, while the barbarous times of feudal anarchy paralysed the energies and enterprise of man, and the names of stranger and enemy were words of the same import, little attention was paid to the cultivation of commerce: the prohibitions and restrictions with which it was loaded savoured less of commercial policy, than of hatred against foreigners and contempt for the mercantile profession<sup>2</sup>. But by degrees the calamities and desolation brought

<sup>1</sup> Taylor's Elements of the Civil Law, 502. Potter's Grecian Antiq. passim. Smith's Wealth of Nations.

<sup>2</sup> During the ignorant times of feudal polity, merchants, like all the other inhabitants of burghs, were considered as little better than emancipated slaves, whose persons were despised and their gains envied. And it is recorded, that it was determined at the council of Melfi, under pope Urban the second, A. D. 1090, that trade being inconsistent with christianity, it was impossible to exercise traffic of any kind. Decret. l. 88. 11.

Foreign commerce is also held in the utmost contempt among the modern Chinese, who scarcely deign to afford it the decent protection of the laws. "Your beggarly commerce!" was the language in which the mandarins of Peking used to talk to M. De Lange, the Russian envoy, concerning it. (Smith's Wealth of Nations, iii. p. 30.) With respect, however, to home manufactures and the mechanic arts they follow a different plan. On all manufacturers and artisans who excel in their respective occupations, they confer

brought upon the western provinces of the Roman empire by its barbarous conquerors were forgotten, and in some measure repaired. The rude tribes which settled there acquiring insensibly some idea of regular government and some relish for the comforts of civil life, Europe began to awake from its torpid and inactive state. The first symptoms of revival were discerned in Italy<sup>1</sup>. The northern tribes, which took possession of this country, made progress in improvement with greater rapidity than the people settled in the other parts of Europe. Foreign commerce revived, navigation was attended to and improved. Constantinople became the chief mart to which the Italians resorted. There they not only met with a favourable reception, but obtained such mercantile privileges as enabled them to carry on trade with great advantage. They were supplied both with the precious commodities of the East, and with many curious manufactures, the product of ancient art and ingenuity which still subsisted among the Greeks. The commercial spirit of Italy became active and

for the honour of mandarin, a noble of the ninth class. Mortimer's *Elements of Commerce*, p. 55.

The same contempt for mercantile pursuits prevailed among many nations of the ancient world. The Thebans had a law, that no person should be capable of any office in the state who had not discontinued trade for the space of ten years. Aristot. III. Polit. 3. The Romans, as we have already seen, went still further; they absolutely forbade all merchandizing (*quæstus omnis indecorus patribus visus est*. Livy, xxi. 63.) to the nobility; all gain was held scandalous in a senator. Cic. Orat. contra Verr. Herodotus records, that the Egyptians, the Scythians, the Persians, and almost all the barbarous nations, considered all persons who applied themselves to commerce as the meanest and lowest sort of subjects, and that their offspring was always thought to be mean and base.

But by the laws of Athelstane, it was enacted, for the encouragement of commerce and navigation, that the merchant who had performed three long voyages should be invested with the title of nobility. Hume's *History of England*.

<sup>1</sup> The re-establishment of commerce is to be attributed to the Venetians. These people, who in the sixth century had, to avoid the ravages of the Barbarians who had destroyed the Roman empire, taken shelter in a few marshy islands which lay near the coast of Italy, in the eighth century became a well established republic, possessing great commercial power. Anderson's *History of Commerce*, vol. i. p. 19.

enterprising.



enterprising. Venice, Genoa, Pisa, arose from inconsiderable towns to be populous and wealthy cities. Their naval power increased; their vessels frequented not only the ports in the Mediterranean, but, venturing sometimes beyond the Straits, visited the maritime towns of Spain, France, the Low Countries, and England; and, by distributing their commodities over Europe, began to communicate to its various nations some taste for the valuable productions of the East, as well as some ideas of manufactures and arts, which were then unknown beyond the precincts of Italy<sup>1</sup>.

Various other causes, however, concurred to revive the spirit of commerce, and to renew, in some degree, that intercourse<sup>2</sup> between nations which during the period of Gothic ignorance and barbarism had nearly ceased. The Italians, by their intercourse with Constantinople and other

<sup>1</sup> Marten's Law of Nations. Smith's Wealth of Nations. Robertson's View of Society. Robertson's History of America.

<sup>2</sup> It may not perhaps be misplaced to speak here of the rise and progress of the intercourse between the different nations of Europe. There does not appear then to have been any very general intercourse between the nations of this quarter of the globe, till the Romans, in endeavouring to make themselves masters of the world, had brought the greatest part of the European states under their dominion. From that time there necessarily subsisted a sort of connexion between them, and this connexion was strengthened by the famous decree of Caracalla, by the adoption of the Roman laws, the influence of the Christian religion, which introduced itself insensibly into all the subdued states, and the navigation to the East and West Indies. After the destruction of the empire of the West, the hierarchal system naturally led the several Christian states to consider themselves, in ecclesiastical matters, as unequal members of one great society. Besides that, the immoderate ascendancy that the bishop of Rome had the address to obtain as spiritual chief of the church, and his making the emperor to be considered as its temporal chief, brought such an accession of authority to the latter, that most of the nations of Europe showed, for some ages, so great a deference for the emperor, that in many respects Europe seemed to form but one society, consisting of unequal members, and subject to one sovereign. This order of things remained until the different powers, perceiving that their rights were violated, shook off the yoke of the pope, or diminished his power, and reduced all the prerogatives that the emperor enjoyed over other crowned heads to the mere point of precedence. Since this epoch, until the usurpation of Buonaparte, there has subsisted no unequal connexion between the powers of Europe, either in spiritual or temporal affairs. Marten's Law of Nations, p. 26.

cities of the Greek empire, had preserved in their own country considerable relish for the precious commodities and curious manufactures of the East. They communicated some knowledge of these to the countries contiguous to Italy. But this commerce being extremely limited, the intercourse which it occasioned between different nations was not considerable. The crusades for the recovery of the Holy Land from the Saracens, in the eleventh and following centuries, by leading multitudes from every corner of Europe into Asia, opened a more extensive communication between the East and West ; and though the object of these expeditions was conquest and not commerce, yet their commercial effects were both beneficial and permanent. These wild enthusiastic expeditions were extremely favourable to the commercial pursuits of the Italian states. The vast armies which marched from all parts of Europe towards Asia on these enterprises gave encouragement to the shipping of Venice, Genoa, and Pisa, sometimes in transporting them thither, and always in supplying them with provisions and military stores. Besides the immense sums which these states received on this account, they obtained commercial privileges and establishments of great consequence in the settlements which the crusaders made in Palestine and in other provinces of Asia. There are charters yet extant, containing grants to the Venetians, Pisans, and Genoese, of the most extensive immunities. All the commodities which they imported or exported are thereby exempted from every imposition ; the property of entire suburbs in some of the maritime towns, and of large streets in others, is vested in them ; and all questions arising among persons settled within their precincts, or who traded under their protection, are appointed to be tried by their own laws and by judges of their own appointment. When the crusaders seized Constantinople, the Venetians did not neglect to secure

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ture to themselves the chief advantages redounding from that event. They made themselves masters of part of the ancient Peloponnesus in Greece, together with some of the most fertile islands in the Archipelago. Many of the valuable branches of the commerce which formerly centred in Constantinople were transferred to Venice, Genoa, or Pisa. Thus from these sources prodigious wealth flowed into these cities. This was accompanied with a proportional increase of power; and by the end of the Holy War, Venice, in particular, became a great maritime state possessing extensive and ample territories<sup>1</sup>.

But Italy was not the only country in which the crusades contributed to revive and diffuse such a spirit as prepared Europe for future discoveries. By their expeditions into Asia, the other European nations became acquainted with remote regions, which formerly they knew only by name, or by the reports of ignorant and credulous pilgrims. They had an opportunity of observing the manners, the arts, and the accommodations of people more polished than themselves. This intercourse between the East and West subsisted about two centuries. The adventurers who returned from Asia communicated to their countrymen the ideas which they had acquired, and the habits of life which they had contracted, by visiting more refined nations. The Europeans began to be sensible of wants with which they were formerly unacquainted: new desires were excited; and such a taste for the commodities and arts of other countries gradually spread among them, that they not only encouraged the resort of foreigners to their harbours, but began to perceive the advantage and necessity of applying to commerce themselves<sup>2</sup>.

<sup>1</sup> Robertson's *View of Society*. Smith's *Wealth of Nations*. Robertson's *History of America*.

<sup>2</sup> Smith's *Wealth of Nations*. Robertson's *History of America*.

Another great cause of the revival of commerce was the invention of the mariner's compass, which, by rendering navigation more secure as well as more adventurous, facilitated the communication between remote nations, and brought them nearer to each other<sup>1</sup>.

During the twelfth and thirteenth centuries the commerce of Europe was entirely in the hands of the Italians. They established a regular commerce with the East in the ports of Egypt, and drew from thence all the rich products of the Indies. Companies or societies of Lombard merchants, the name by which the Italian traders were commonly known in those ages, settled in every different kingdom. They were taken under the immediate protection of the several governments. They enjoyed extensive privileges and immunities. The operation of the ancient and barbarous laws concerning strangers was suspended with respect to them. They became the carriers, the manufacturers, and the bankers of all Europe<sup>2</sup>.

While the Italians in the south of Europe were cultivating trade with such industry and success, the commercial spirit awakened in the north towards the middle of the thirteenth century. As the nations round the Baltic were at that time extremely barbarous, and infested that sea with their piracies, the cities of Lubec and Hamburgh, soon after they began to open some trade with these people, found it necessary to enter into a league of mutual defence. They derived such advantages from this union, that other towns acceded to their confederacy; and in a short time eighty of the most considerable cities, scattered through those extensive countries which stretch from the bottom of the Baltic to Cologne on the Rhine, joined in the famous Han-

<sup>1</sup> Robertson's *View of Society*, p. 91. Huet, *Traité du Commerce des Anciens*, c. 10.

<sup>2</sup> Robertson's *View of Society*, p. 92.



seatic league; which became so formidable, that its alliance was courted, and its enmity was dreaded, by the greatest monarchs. The members of this powerful association formed the first systematic plan of commerce known in the middle ages, and conducted it by common laws enacted in their general assemblies. They supplied the rest of Europe with naval stores, and pitched on different towns, the most eminent of which was Bruges in Flanders, where they established staples in which their commerce was regularly carried on. Thither the Lombards brought the productions of India, together with the manufactures of Italy, and exchanged them for the more bulky commodities of the North. The Hanseatic merchants disposed of the cargoes which they received from the Lombards, in the ports of the Baltic, or carried them up the great rivers into the interior parts of Germany<sup>1</sup>.

This regular intercourse opened between the nations in the north and south of Europe made them sensible of their mutual wants, and created such new and increasing demands for commodities of every kind, that it excited among the inhabitants of the Netherlands a more vigorous spirit in carrying on the two great manufactures of wool and flax, which seem to have been considerable in that country as early as the age of Charlemagne. As Bruges became the centre of communication between the Lombard and Hanseatic merchants, the Flemings traded with both in that city to such extent as well as advantage, as spread among them a general habit of industry, which long rendered Flanders and the adjacent provinces the most opulent, the most populous, and the best cultivated countries in Europe<sup>2</sup>.

Struck with the flourishing state of these provinces, of which he discerned the true cause, Edward the Third of England endeavoured to excite a spirit of industry among

<sup>1</sup> Ibid.<sup>2</sup> Ibid.

his own subjects, who, blind<sup>1</sup> to the advantages of their situation, and ignorant of the source from which opulence was destined to flow into their country, were so little attentive to their commercial interests, as hardly to attempt those manufactures the materials of which they furnished to foreigners. By alluring Flemish artisans to settle in his dominions, as well as by many wise laws for the encouragement and regulation of trade, Edward gave a beginning to the woollen manufactures of England, and first turned the active and enterprising genius of his people toward arts which have raised the English to the highest rank amongst commercial nations. But notwithstanding the endeavours of Edward, and the many wise establishments proposed and encouraged by him, it was not till the reign of Elizabeth that the English began to discover their true interests, and the arts by which they were to obtain that pre-eminence and rank which they now hold among commercial nations. The causes of this slow progress of commerce are obvious. During the Saxon heptarchy, England, split into many petty kingdoms, which were perpetually at variance with each other; exposed to the fierce incursions of the Danes and other northern pirates; and sunk in barbarism and ignorance, was in no condition to cultivate commerce, or to pursue any system of useful and salutary policy. To this succeeded the Norman conquest, and all the consequences of a feudal government, military in its nature, hostile to commerce, and the arts and refinements of a liberal and

<sup>1</sup> In England the progress of commerce was extremely slow: it was one of the last nations in Europe that availed itself of those commercial advantages which were natural or peculiar to it. The first commercial treaty of England on record is that with Haguin king of Norway, A.D. 1217. (Anders. vol. i. p. 198.) But the English did not venture to trade in their own ships to the Baltic until the beginning of the fourteenth century. (Ibid. p. 151.) It was after the middle of the fifteenth before they sent any ship into the Mediterranean. (Ibid. p. 177.) Nor was it long before this period that their vessels began to visit the ports of Spain and Portugal. Robertson's Hist. of Charles V. Notes and Illustrations, 30.

civilized people. Scarce had the nation recovered from the shock occasioned by this revolution, and acquired some stability by incorporating with their conquerors, but it was engaged with no less ardour than imprudence, in support of the pretensions of its monarch to the crown of France, and long wasted its vigour and genius in wild endeavours to conquer that kingdom. After this followed the destructive wars between the houses of York and Lancaster, which long deluged the kingdom with blood ; and to which a period was at last happily put by an union of their several titles to the crown in the person of Henry the Eighth<sup>1</sup>. Under this monarch commercial affairs began to flourish ; but it was not until about the middle of the reign of queen Elizabeth<sup>2</sup> that they began to assume a degree of form and regularity, and to find shelter and protection from the managers of public affairs<sup>3</sup>.

Besides the causes already mentioned, which concurred to revive the spirit of commerce and promote the intercourse of nations, (*viz.* the establishment of the Venetians, the Genoese, and the Pisans, the crusades, and the invention of the mariner's compass,) other causes conduced to open men's eyes to the solid importance of commerce, and to give motion and vigour to all the active powers of the human mind. The discovery of America and the navigation to the East Indies followed, and totally changed the face of things.

The discovery of America, which gave a new world to European curiosity, by opening an inexhaustible market to all the commodities of Europe, gave occasion to

<sup>1</sup> Robertson's *View of Society*, p. 94 ; and *Notes and Illustrations*, p. 30.

<sup>2</sup> Sir William Jones calls this the commercial reign. Jones's *Law of Bailments*, p. 103. And Lord Kenyon, in the case of *Rex v. Waddington*, 1 East's Rep. said that "under the acts passed by a Cecil it was that commerce had been raised up in this country to its present gigantic size."

<sup>3</sup> Hume's *Hist. of England*. Park's *Insurance*, preface, p. 35.

new divisions of labour and improvements of art, which in the narrow circle of the ancient commerce could never have taken place for want of a market to take off the greater part of their produce. The productive powers of labour were improved, and its produce increased in all the different countries of Europe, and, together with it, the real wealth and revenue of the inhabitants. The commodities were almost all new to America, and many of those of America were new to Europe. A new set of exchanges, therefore, began to take place which had never been thought of before, and which naturally would have proved as advantageous to the new as it certainly did to the old continent, had not the savage injustice of Europeans rendered an event which ought to have been beneficial to all, ruinous and destructive to several of those unfortunate countries<sup>1</sup>.

By the discovery of a passage to the East Indies by the Cape of Good Hope, which happened much about the same time, a still more extensive range was perhaps opened to foreign commerce than even that of America, notwithstanding the greater distance. There were but two nations in America in any respect superior to savages, and these were destroyed almost as soon as discovered. The rest were mere savages. But the empires of China, Indostan, Japan, as well as several others in the East Indies, without having richer mines of gold and silver, were in every other respect much richer, better cultivated, and more advanced in all arts and manufactures, than either Mexico or Peru, even though we should credit, what plainly deserves no credit, the exaggerated accounts of the Spanish writers concerning the ancient state of those empires. But rich and civilized nations can always exchange to a much greater value with one another than with savages and barbarians. Besides,

<sup>1</sup> Smith's *Wealth of Nations*, ii. p. 177.



the trade to the East Indies, by opening a market to the commodities of Europe, or, what comes nearly to the same thing, to the gold and silver which is purchased with those commodities, must necessarily tend to increase the annual production of European commodities, and consequently the real wealth and revenue of Europe. That it has derived much less advantage from its commerce with the East Indies than from that of America, Dr. Smith observes, is probably owing to the restraints that it every where labours under from the privileges of exclusive companies<sup>1</sup>.

After the two important events in the history of commerce, viz. the discovery of America and of the passage to the East Indies, communities began to be animated by a commercial spirit of enterprise, and most of the powers of Europe began to think seriously of maritime commerce, and to consider it as one of the most effective means of augmenting their riches and power. Some of them succeeded in acquiring possessions out of Europe. Others took care to encourage commerce, at least, in their home possessions, and to procure for their subjects, by the means of laws and treaties, solid advantages, which were no less solid for the state at the time, since their chief tendency was to leave a balance in its favour<sup>2</sup>.

<sup>1</sup> Ibid. pp. 178, 180.

<sup>2</sup> Marten's Law of Nations, p. 150.

## PART II.

## OF THE MEDIUM OF COMMERCE.

IN the first stage of society, barter or permutation was the method of carrying on commerce between nations: some people having a superfluity of those goods which others wanted, both parties would naturally be inclined to exchange their superfluities with each other, as by that means they could procure what they wanted, by parting with that which they did not want. This method of traffic continued even to the seventeenth century. The English, French, and Dutch traders first carried their merchandize to Archangel, and there trucked it with the Russians for the products of that vast empire<sup>1</sup>. But as men and their wants multiplied, this sort of commerce, in its original form, could not be carried on at a distance, or even among neighbours, it not always happening that one nation could spare what another wanted. Many different commodities, it is probable, were successively both thought of and employed for this purpose. In the rude ages of society, cattle are said to have been the common instrument of commerce; and though they must have been a most inconvenient one, yet in old times we find that things were frequently valued according to the number of cattle which had been given in exchange for them. The armour of Diomedes, says Homer, cost only nine oxen; but that of Glaucus cost a hun-

<sup>1</sup> The revenues of the ancient Saxon kings of England are said to have been paid not in money, but in kind; that is, in victuals and provisions of all sorts. William the Norman introduced the custom of paying them in money. This money, however, was for a long time received at the exchequer by weight, and not by tale. And so late as the fourteenth century, twenty thousand sacks of wool were sent to Antwerp, to pay the expenses of the English army in the Netherlands. Smith's *Wealth of Nations*, i. p. 40.

dred. It is also mentioned by Pausanias and Aristotle, as a custom which still subsisted in their times among the Barbarians : and we learn from other authors that it was the practice of the ancient Germans, Britons, and Lusitanians. To this day, among the Tartars, as also among all nations of shepherds, who are generally ignorant of the use of money, cattle are the common instruments of commerce and the measure of value. Salt is said to be the common instrument of commerce and exchanges in Abyssinia ; a species of shells in some parts of the coast of India ; dried cōd at Newfoundland ; tobacco in Virginia ; sugar in some of our West India colonies ; hides and dressed leather in some other countries ; and in some towns in Scotland, even at this day, nails are used instead of money. Among the savages of North America, the only standard of exchanges is the skin of a beaver<sup>1</sup>.

A common medium, which might be equally adapted to every one's wants, by being made by mutual agreement the common measure of exchange, which should be at the same time portable, and divisible into parts equal to the value of the goods bought or sold, was long the object of the most earnest investigation. Metals, therefore, were adopted. In all countries, men seem at last to have been determined by irresistible reasons to give the preference for this employment to metals above every other commodity. Their homogeneous quality in all countries adapted them, in a peculiar manner, for facilitating the purposes of commerce, and consequently as a standard of the comparative value of commodities. They cannot only be kept with as little loss as any other commodity, scarce any thing being less perishable than they are, but they can likewise, without any loss, be divided into any number of parts, as by

<sup>1</sup> Home's Sketches, vol. i. p. 61. Smith's Wealth of Nations, i. p. 36. Taylor's Elements of the Civil Law, p. 499.

fusion those parts can be easily united again; a quality which no other equally durable commodities possess, and which, more than any other quality, renders them fit to be instruments of commerce and circulation. The man who wanted to buy salt, for example, and had nothing but cattle to give in exchange for it, must have been obliged to buy salt to the value of a whole ox, or a whole sheep, at a time. He could seldom buy less than this, because what he was to give for it could seldom be divided without loss; and if he had a mind to buy more, he must, for the same reasons, have been obliged to buy double or triple the quantity; the value, to wit, of two or three oxen, or of two or three sheep. If on the contrary, instead of sheep and oxen, he had metals to give in exchange for it, he could easily proportion the quantity of the metal to the precise quantity of the commodity for which he had immediate occasion<sup>1</sup>.

Different metals have been made use of by different nations for this purpose. Iron was the common instrument of commerce among the ancient Spartans; copper among the ancient Romans, until five years before the first Punic war, when they first began to coin silver; and gold and silver among all commercial nations. In England, silver coins were in use in the time of the Saxons, but there was little gold coined till the time of Edward the Third, nor any copper till that of James the First<sup>2</sup>.

In the invention of money there are two periods, that wherein it was weighed, when it consisted either of small bars of iron, brass, or silver, or large plates of the same metals, and that wherein it was coined. The denominations of money and the several terms of exchange, both in the Greek and Roman languages, evidently refer us to this

<sup>1</sup> Ibid. ut ante.

<sup>2</sup> Smith's *Wealth of Nations*, i. p. 38, 61.



ancient practice<sup>1</sup>. Originally the circulating medium consisted of rude bars of metal without any stamp or coinage. Thus, we are told by Pliny, (*Hist. Nat. lib. xxxiii. c. 3.*) upon the authority of Timæus, an ancient historian, that till the time of Servius Tullius the Romans had no coined money, but made use of unstamped bars of copper to purchase whatever they had occasion for. These rude bars, therefore, performed at this time the functions of money<sup>2</sup>. But, in time, more nicety came to be introduced into the commerce of metals; instead of being given loosely by bulk, every portion was weighed in scales, or assayed in the crucible. Even weight and the tedious and difficult operation of assaying were at length discovered to be an imperfect standard: To prevent, then, fraud and imposition, and to facilitate exchanges, pieces of these metals, with a public stamp vouching both the purity and quantity, were introduced; and such pieces were termed coins. This was a notable improvement, says Lord Kaimes, in commerce; and, like other improvements, was probably at first thought the utmost stretch of human invention. It was not foreseen, continues that perspicacious writer, that these metals wear by much handling, so that in time the public stamp is reduced to be a voucher of the purity only, not of the quantity. Hence proceeded manifold inconveniences, and much embarrassment in commerce; which no doubt, together with the scarcity of the precious metals, facilitated the introduction of paper money, which is free from that embarrassment<sup>3</sup>.

It may not be improper to state here the advantages arising from the introduction of paper money as a circulating medium. A well regulated paper money, Dr. Smith ob-

<sup>1</sup> Taylor's Elements, p. 488.

<sup>2</sup> Ibid.

<sup>3</sup> Home's Sketches, vol. i. p. 51.

serves in his *Wealth of Nations*, will supply a scarcity of the precious metals, not only without any inconveniency, but in some cases with some advantages.

The substitution of paper in the room of gold and silver money replaces a very expensive instrument of commerce with one much less costly, and sometimes equally convenient. Circulation comes to be carried on by a new wheel, which it costs less both to erect and to maintain than the old one. But in what manner this operation is performed, and in what way it tends to increase either the gross or the neat revenue of the society, is not altogether so obvious, and may therefore require some further explication.

There are several different sorts of paper money; but the circulating notes of banks and bankers are the species which is best known, and which seems best adapted for this purpose.

A particular banker lends among his customers his own promissory notes, to the extent, we shall suppose, of a hundred thousand pounds. As those notes serve all the purposes of money, his debtors pay him the same interest as if he had lent them so much money. The interest is the source of his gain. Though some of those notes are continually coming back upon him for payment, part of them continue to circulate for months and years together. Though he has generally in circulation, therefore, notes to the extent of one hundred thousand pounds, twenty thousand pounds in gold and silver may, frequently, be a sufficient provision for answering occasional demands. By this operation, therefore, twenty thousand pounds in gold and silver perform all the operations which a hundred thousand could otherwise have performed. The same exchanges may be made, the same quantity of consumable goods may be circulated and distributed to their proper consumers, by means of his promissory notes to the value of a hundred thousand

thousand pounds, as by an equal value of gold and silver money. Eighty thousand pounds of gold and silver, therefore, can, in this manner, be spared from the circulation of the country; and if different operations of the same kind should, at the same time, be carried on by many different banks and bankers, the whole circulation may thus be conducted with a fifth part only of the gold and silver which would otherwise have been requisite.

Let us suppose, for example, that the whole circulating money of some particular country amounted, at a particular time, to one million sterling, that sum being then sufficient for circulating the whole annual produce of their land and labour. Let us suppose too, that some time thereafter, different banks and bankers issued promissory notes, payable to the bearer, to the extent of one million, reserving in their different coffers two hundred thousand pounds for answering occasional demands. There would remain, therefore, in circulation, eight hundred thousand pounds in gold and silver, and a million of bank notes, or eighteen hundred thousand pounds of paper and money together. But the annual produce of the land and labour of the country had before required only one million to circulate and distribute it to their proper consumers, and that annual produce cannot be immediately augmented by those operations of banking. One million, therefore, will be sufficient to circulate it after them. The goods to be bought and sold being precisely the same as before, the same quantity of money will be sufficient for buying and selling them. The channel of circulation, continues Dr. Smith, if I may be allowed such an expression, will remain precisely the same as before. One million we have supposed sufficient to fill that channel. Whatever, therefore, is poured into it beyond this sum, cannot run in it, but must overflow. One million eight hundred thousand pounds are poured  
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into it. Eight hundred thousand pounds must therefore overflow, that sum being over and above what can be employed in the circulation of the country. But though this sum cannot be employed at home, it is too valuable to be allowed to lie idle. It will, therefore, be sent abroad, in order to seek that profitable employment which it cannot find at home. But the paper cannot go abroad; because at a distance from the banks that issue it, and from the country in which payment of it can be exacted by law, it will not be received in common payments. Gold and silver, therefore, to the amount of eight hundred thousand pounds will be sent abroad, and the channel of home circulation will remain filled with a million of paper, instead of a million of those metals which filled it before.

From these premises it is evident then, that when paper is substituted in the room of gold and silver money, the quantity of the materials, tools, and maintenance, which the whole circulating capital can supply, may be increased by the whole value of gold and silver which used to be employed in purchasing them. The whole value of the great wheel of circulation and distribution is added to the goods which are circulated and distributed by means of it. The operation in some measure, Dr. Smith observes, resembles that of the undertaker of some great work, who, in consequence of some improvement in mechanics, takes down his old machinery, and adds the difference between its price and that of the new to his circulating capital, to the fund from which he furnishes materials and wages for his workmen.

When, therefore, by the substitution of paper money, the gold and silver necessary for circulation is reduced to, perhaps, a fifth part of the former quantity, if the value of the greater part of the other four-fifths be added to the funds which are destined for the maintenance of industry, it must  
make



make a very considerable addition to the quantity of that industry, and consequently to the value of the annual produce of land and labour.

An operation of this kind, continues Dr. Smith, has within these five-and-twenty or thirty years been performed in Scotland, by the erection of new banking companies in almost every considerable town, and even in some country villages. The effects of it have been precisely those above described.

Particular attention, however, must be paid, that the circulation be not overstocked with paper money. The whole paper money of every kind which can easily circulate in any country never can exceed the value of the gold and silver of which it supplies the place, or which (the commerce being supposed the same) would circulate there if there was no paper money. Should the circulating paper at any time exceed that value, as the excess could neither be sent abroad nor be employed in the circulation of the country, it must be immediately returned upon the banks to be exchanged for gold and silver. There would immediately be a run upon the banks to the whole extent of this superfluous paper, and, if they showed any difficulty or backwardness in payment, to a much greater extent; the alarm which this would occasion, necessarily increasing the run.

*off something seems to be  
wanted to complete the sentence  
suppose we add*

*"would consequently destroy  
confidence (and ultimately cause)  
bankruptcy amongst all the holders  
of paper currency and even finally,  
a destruction of all <sup>the</sup> mercantile  
concerns of a Nation trading with such  
banks."*

## PART III.

## OF COMMERCIAL POLITICS \*.

COMMERCE being one of the most efficacious means of augmenting the ease, the riches, and even the power of a nation, it is of the first importance to examine the causes of its advancement and decline. For this purpose we shall consider it in three points of view: 1. The most advantageous way in which the capital of a country may be employed: 2. What effects money has upon commerce; and 3. The causes of the advancement and decline of commerce.

## SECTION I.

## OF THE EMPLOYMENT OF CAPITAL IN COMMERCE.

A capital, says Dr. Smith, may be employed in four different ways, each of which is essentially necessary either to the existence or extension of the other three: first, it may be employed in procuring the rude produce annually required for the use and consumption of the society; secondly, in manufacturing and preparing that rude produce for immediate use and consumption; thirdly, in transporting either the rude or manufactured produce from the places where they abound to those where they are wanted; or lastly, in dividing particular portions of either into such small parcels as suit the occasional demands of those who want them. In the first way are employed the capitals of

\* To avoid a repetition of reference, we shall acknowledge once for all, that the whole of this part is taken from the works of Dr. Adam Smith and Lord Kaimes, whose solid reasonings and conclusive deductions have received the confirmation of truth and experience.

all those who undertake the improvement or cultivation of lands, mines, or fisheries; in the second, those of all masters manufacturers; in the third, those of all wholesale merchants; and in the fourth, those of all retailers. It is difficult to conceive, continues that patriotic writer, that a capital should be employed in any way which may not be classed under some one or other of these four.

Equal capitals, however, employed in each of these four different ways will immediately put into motion very different quantities of productive labour, and augment too in very different proportions the value of the annual produce of the land and labour to which they belong. In countries which have not a sufficient capital to employ at the same time in the improvement and cultivation of all their lands, in the manufacture and preparation of their whole rude produce for immediate use and consumption, and in the transportation of the surplus part either of the rude or manufactured produce to those distant markets where it can be exchanged for something for which there is a demand at home; of all the ways in which a capital can be employed that of agriculture is of far the most advantage to the society. After agriculture, the capital employed in manufactures puts into motion the greatest quantity of productive labour, and adds the greatest value to the annual produce. That which is employed in the trade of exportation, has the least effect of any of the three.

The capital that is acquired to any country by commerce and manufactures, is all a very precarious and uncertain possession, till some part of it has been secured and realized in the cultivation and improvement of its lands. A merchant, it has been said very properly, is not necessarily the citizen of any particular country. It is in a great measure indifferent to him from what place he carries on his trade; and a very trifling disgust will make him remove his capital,

tal, and together with it all the industry which it supports, from one country to another. No part of it can belong to any particular country, till it has been spread as it were over the face of that country, either in buildings, or in the lasting improvement of lands. No vestige now remains of the great wealth said to have been possessed by the greater part of the Hans towns, except in the obscure histories of the thirteenth and fourteenth centuries. It is even uncertain where some of them are situated, or to what towns in Europe the Latin names given to some of them belong. But though the misfortunes of Italy in the end of the fifteenth and beginning of the sixteenth centuries greatly diminished the commerce and manufactures of the cities of Lombardy and Tuscany, those countries still continue to be among the most populous and best cultivated in Europe. The civil wars of Flanders, and the Spanish government which succeeded them, chased away the great commerce of Antwerp, Ghent, and Bruges. But Flanders continued to be one of the richest, best cultivated, and most populous provinces of Europe. Neither have the pillage and devastation of the French revolutionists robbed it of its agricultural riches. The ordinary revolutions of war and government easily dry up the sources of that wealth which arises from commerce only. That which arises from the more solid improvements of agriculture is much more durable, and cannot be destroyed but by those more violent convulsions occasioned by the depredations of hostile and barbarous nations continued for a century or two together; such as those that happened for some time before and after the fall of the Roman empire in the western provinces of Europe.

But as the extension and advancement of commerce are the objects of our inquiries, we shall confine ourselves to the elucidation of the employment of the capital of the wholesale merchant, referring only incidentally, or when  
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the nature of the subject requires, to its operation upon agriculture and manufactures.

Every individual, continues the author of the *Wealth of Nations*, is continually exerting himself to find out the most advantageous employment for whatever capital he can command. The consideration of his own private profit is the sole motive which determines the owner of any capital to employ it either in agriculture, in manufactures, or in some particular branch of the wholesale or retail trade. The different quantities of productive labour which it may put into motion, and the different values which it may add to the annual produce of the land and labour of the society, according as it is employed in one or other of those different ways, never enter into his thoughts. In countries, therefore, where agriculture is the most profitable of all employments, and forming and improving the most direct roads to a splendid fortune, the capitals of individuals will naturally be employed in the manner most advantageous to the whole society. The employment of capital in this method, besides that it is the most advantageous to the society, is the most congenial to the disposition of man; for as the cultivation of the ground was the original destination of man, so in every stage of his existence he seems to retain a predilection for this primitive employment. Besides, where profits are equal, or nearly equal, most men will choose to employ their fortunes rather in the improvement and cultivation of land, than either in manufactures or in foreign trade; to have them more under their view and command, than commit them, not only to the winds and the waves, but to the more uncertain elements of human folly and injustice; by giving great credits in distant countries to men with whose character and situation they can seldom be thoroughly acquainted.

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The profits of agriculture, however, seem to have no superiority over those of other employments in any part of Europe. Projectors, indeed, in every corner of it, have within these few years, continues Dr. Smith, amused the public with most magnificent accounts of the profits to be made by the cultivation and improvement of land. Without entering into any particular discussion of their calculations, a very simple observation may satisfy us that the result of them must be false. We see every day the most splendid fortunes that have been acquired in the course of a single life by trade and manufactures, frequently from very small capitals, sometimes from no capital. A single instance of such a fortune acquired by agriculture in the same time, and from such a capital, has not perhaps occurred in Europe during the course of a century.

As the same capital will in any country, according to the different modes and proportions in which it is employed, add a greater or smaller value to the annual produce of the land and labour; so the difference too is very great according to the different sorts of trade in which any part of it is employed.

All wholesale trade, all buying in order to sell again by wholesale, says Dr. Smith, may be reduced to three different sorts. The home trade, the foreign trade of consumption, and the carrying trade. The home trade is employed in purchasing in one part of the same country, and selling in another, the produce of the industry of that country. It comprehends both the inland and the coasting trade. The foreign trade of consumption is employed in purchasing foreign goods for home consumption. The carrying trade is employed in transacting the commerce of foreign countries, or in carrying the surplus produce of one to another.

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Of these, continues Dr. Smith, the capital employed in the home trade of any country will generally give encouragement and support to a greater quantity of productive labour in that country, and increase the value of its annual produce more than an equal capital employed in the home trade of consumption: and the capital employed in this latter trade has in both these respects a still greater advantage over an equal capital employed in the carrying trade. The riches, and, so far as power depends upon riches, the power of every country must always be in proportion to the value of the annual produce, the fund from which all taxes must ultimately be paid. But the great object of the political economy of every country, is to increase the riches and power of that country. It ought, therefore, to give no preference nor superior encouragement to the foreign trade of consumption above the home trade, nor to the carrying trade above either of the other two. It ought neither to force nor to allure into either of those two channels, a greater share of the capital of the country than what would naturally flow into them of their own accord.

The extent of the home trade, and of the capital which can be employed in it, is necessarily limited by the value of the surplus produce of all those distant places within the country which have occasion to exchange their respective productions with one another; that of the foreign trade of consumption, by the value of the surplus produce of the whole country and of what can be purchased with it; that of the carrying trade, by the value of the surplus produce of all the different countries of the world. Its possible extent, therefore, is in a manner infinite in comparison of that of the other two, and is capable of absorbing the greatest capitals.

## SECTION II.

## OF THE EFFECTS OF MONEY UPON COMMERCE.

Before we enter upon the inquiry how commerce is effected by the quantity of circulating coin, it seems necessary to premise a few observations concerning the operation of the value of a commodity on the demand. We may say, generally, that the value of a commodity depends chiefly, though not solely, on the demand. Quantity beyond the demand renders even necessities of no value; of which water is an instance. It may be held accordingly as a general rule, that the value of goods in commerce depends on a demand beyond what their quantity can satisfy; and rises in proportion to the excess of the demand above the quantity. Even water becomes valuable in countries where the demand exceeds the quantity: in arid regions springs of water are highly valued; and in old times were frequently the occasion of broils and bloodshed. Comparing next different commodities with respect to value, that commodity of which the excess of the demand above the quantity is greater, will be of the greater value. Were utility or intrinsic value only to be considered, a pound of iron would be worth ten pounds of gold; but as the excess of the demand for gold above its quantity is much greater than that of iron, the latter is of less value in the market. A pound of opium or of Jesuit's bark is, for its salutary effects, more valuable than gold; and yet, for the reason given, a pound of gold will purchase many pounds of these drugs. Thus, in general, the excess of the demand above the quantity is the standard that chiefly fixes the mercantile value of commodities.

But as our chief view is to examine how far industry and commerce are affected by the quantity of circulating coin,



we premise, in that view, the following plain propositions : Supposing, first, the quantity of money in circulation and the quantity of goods in the market to continue the same, the price will rise and fall with the demand. For when more goods are demanded than the market affords, those who offer the highest price will be preferred ; as on the other hand, when the goods brought to market exceed the demand, the venders have no resource but to entice purchasers by a low price. The price of fish, flesh, butter, and cheese, is much higher than formerly ; for, these being now the daily food of the lowest people, the demand for them is greatly increased. But though the increase of demand may in the beginning sometimes raise the price of goods ; it never fails to lower it in the long run. It encourages production, and thereby increases the competition of the producers, who, in order to undersell one another, have recourse to new divisions of labour and new improvements of art, which might never otherwise have been thought of.

Supposing now a fluctuation in the quantity of goods only, the price falls as the quantity increases, and rises as the quantity decreases. The farmer whose quantity of corn is doubled by a favourable season, must sell at half the usual price ; because the purchaser, who sees a superfluity, will pay no more for it. The contrary happens upon a scanty crop ; those who want corn must starve, or give the market price, however high. The manufactures of wool, flax, and metals, are much cheaper than formerly ; for though the demand has increased, yet by skill and industry the quantities produced have increased in a greater proportion.

It is easy to combine the quantity and demand, supposing a fluctuation in both. Where the quantity exceeds the usual demand, more people will be tempted to purchase by the low price ; and where the demand rises considerably above the quantity, the price will rise in proportion. In mathe-

matical language these propositions may be thus expressed, that the price is directly as the demand, and inversely as the quantity.

A variation in the quantity of circulating coin is the most intricate circumstance; because it never happens without making a variation in the demand for goods, and frequently in the quantity. I take the liberty, however, continues Lord Kaims, to suppose that there is no variation but in the quantity of circulating coin; for though that cannot happen in reality, yet the result of the supposition will throw light upon what really happens: the subject is involved, and I wish to make it plain. I put a simple case, that the half of our current coin is at once swept away by some extraordinary accident. This at first will embarrass our external commerce, as the vender will insist for the usual price; which now cannot be afforded. But the error of such demand will soon be discovered; and the price of commodities, after some fluctuation, will settle at the one half of what it was formerly. At the same time, there is here no downfall in the value of commodities, which cannot happen while the quantity and demand continue unvaried. The purchasing for a sixpence what formerly cost a shilling, makes no alteration in the value of the thing purchased; because a sixpence is equal in value to what a shilling was formerly. In a word, when money is scarce, it must bear a high value: it must in particular go far in the purchase of goods; which we express by saying that goods are cheap. Put the next case, that by some accident our specie is instantly doubled. Upon supposition that the quantity and demand continue unvaried, the result must be, not instantaneous indeed, to double the price of commodities. Upon the former supposition, a shilling has in effect sunk down to a sixpence. And here again it ought to be observed, that though the price is augmented, there is no real alteration.

alteration in the value of commodities. A bullock, says the same author, that some years ago could have been purchased for ten pounds, will at present yield fifteen. The vulgar ignorantly think that the value of horned cattle has risen in that proportion. The advanced price may, in some degree, be occasioned by a greater consumption; but it is chiefly occasioned by a greater quantity of money in circulation\*.

Combining all the circumstances, the result is, that if the quantity of goods and of money continue the same, the price will be in proportion to the demand: if the demand and quantity of goods continue the same, the price will be in proportion to the quantity of money. And if the demand and quantity of money continue the same, the price will fall as the quantity increases, and rise as the quantity diminishes.

The effects of money on the prices of labour are deserving of the closest attention. It may be held as a general rule, that the increase of money raises the price of every commodity; partly from the greater quantity of money, and partly from the additional demand for supplying those artificial wants which money generates. High wages will undoubtedly promote at first the spirit of industry, and double the quantity of labour: but the utmost exertion of labour is limited within certain bounds; and consequently a perpetual influx of gold and silver will not for ever be attended with a proportionable quantity of work: the price of labour will rise in proportion to the quantity of money; but the produce will not rise in the same proportion; and

\* This important maxim has received the incontestable sanction of Dr. Smith, who in his *Wealth of Nations* observes, That degradation in the value of silver, which is the effect of the fertility of the mines, and which operates equally or very nearly equally through the greater part of the commercial world, is a matter of very little consequence to any particular country. The consequent rise of all money prices, though it does not make those who receive them really richer, does not make them really poorer. A service of plate becomes really cheaper, and every thing else remains precisely of the same real value as before.

for that reason our manufactures will be dearer than formerly. Hence a dismal scene. The high price at home of our manufactures will exclude us from foreign markets; for, if the merchant cannot draw there for his goods what he paid at home, with some profit, he must abandon foreign commerce altogether. And what is even still more dismal, we shall be deprived even of our own markets; for, in spite of the utmost diligence, foreign commodities cheaper than our own will be poured in upon us\*.

But however certain it may appear, that an augmentation in the quantity of money must raise the price of labour and of manufactures, yet there is a fact that seems to contradict this proposition, which is, that in no country are labour and manufactures so cheap as in the two peninsulas on the right and left of the Ganges, though in no other country is there such plenty of money. To account for this singular fact, political writers say, that money is there amassed by the nabobs, and withdrawn from circulation. This is not satisfactory: the chief exportation from these peninsulas are their manufactures, the price of which comes first to the merchant and manufacturer; and how can that happen without raising the price of labour? Rice, it is true, is the food of the labouring poor; and an acre of rice yields

\* There seems to be, says Mr. Hume in his *Essay on Money*, a happy concurrence in human affairs, which checks the growth of trade and riches, and hinders them from being confined entirely to one people; as might naturally at first be dreaded from the advantages of an established commerce. Where one nation has got the start of another in trade, it is very difficult for the latter to regain the ground it has lost; because of the superior industry and skill of the former, and the greater stocks of which its merchants are possessed, and which enable them to trade for so much smaller profits. But these advantages are compensated in some measure by the low price of labour in every nation which has not an extensive commerce, and does not very much abound in gold and silver. Manufactures, therefore, gradually shift their places, leaving those countries and provinces which they have already enriched, and flying to others, whither they are allured by the cheapness of provisions and labour; till they have enriched these also, and are again banished by the same causes. And in general we may observe, that the dearthness of every thing from plenty of money, is a disadvantage which attends an established commerce, and sets bounds to it in every country, by enabling the poorer states to undersell the richer in all foreign markets.



two, sometimes three, crops in the year, each of them more plentiful than any common crop of corn: but the cheapness of necessaries, though it has a considerable influence in keeping down the price of labour, cannot have an effect so extraordinary as to keep it constantly down, in opposition to an overflowing current of money. The populousness of these two countries is a circumstance that has been totally overlooked. Every traveller is amazed how such swarms of people can find bread, however fertile the soil may be. Let us examine that circumstance. One thing is evident, that were the people fully employed, there would not be a demand for the tenth part of their manufactures. Here then is a country where hand labour is a drug for want of employment. The people at the same time, sober and industrious, are glad to be employed at any rate; and whatever pittance is gained by labour makes always some addition towards their support. Hence it is that, in these peninsulas, superfluity of hands overbalancing both the quantity of money and the demand for their manufactures, serves to keep the price much lower than it is any where in Europe. Through the greater part of Europe, too, the expense of land carriage increases very much both the real and nominal price of most manufactures. It costs more labour, and therefore more money, to bring first the materials, and afterwards the complete manufacture to market. In China and Indostan the extent and variety of inland navigations save the greater part of this labour, and consequently of this money, and thereby reduce still lower both the real and the nominal price of the greater part of their manufactures.

What is now said discovers an error in the proposition above laid down. It holds undoubtedly in Europe, and in every country where there is work for all the people, that an augmentation in the circulating coin raises the price of labour and manufactures; but such augmentation has no sensible



sensible effect in a country where there is a superfluity of hands, who are always disposed to work when they find employment.

From these premises it will be evident, that unless there be a superfluity of hands, manufactures can never flourish in a country abounding with mines of gold and silver. This in effect is the case with Spain: a constant influx of those metals, raising the price of labour and of manufactures, has deprived the Spaniards of foreign markets and also of their own: they are reduced to purchase from strangers even the necessaries of life.

To illustrate this observation, which indeed is of great importance, we will enter more minutely into the condition of Spain. The rough materials of silk, wool, and iron, are produced there more perfect than in any other country; and yet flourishing manufactures of these would be ruinous to it in its present state. Let us only suppose that Spain itself could furnish all the commodities that are demanded in its American territories; what would be the consequence? The gold and silver produced by that trade would centre and circulate in Spain: money would become a drug: labour and manufactures would rise to a high price; and every necessary of life, not excepting manufactures of silk, wool, and iron, would be smuggled into Spain, the high price there being sufficient to overbalance every risk: Spain would be left without industry, and without people. Spain was actually in the flourishing state here supposed, when America was discovered; its gold and silver mines inflamed the disease, and consequently were the greatest misfortune that ever befell that once potent kingdom. The exportation of our silver coin to the East Indies, so loudly exclaimed against by shallow politicians, is to us, on the contrary, a most substantial benefit; it keeps up the value of silver, and consequently lessens the value of labour and goods; which  
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enables us to maintain our place in foreign markets. Were there no drain for our silver, its quantity in our continent would sink its value so much as to render the American mines unprofitable. Notwithstanding the great flow of money to the East Indies, many mines in the West Indies are given up, because they afford not the expense of working; and were the value of silver in Europe brought much lower, the whole silver mines in the West Indies would be necessarily abandoned. Thus our East India commerce, which is thought ruinous by many, because it is a drain to much of our silver, is for that very reason profitable to all. The Spaniards profit by importing it into Europe; and other nations profit by receiving it for their manufactures, the value paid for which they afterwards export to India. Besides, there is scarce any commodity which brings a better price there; or which, in proportion to the quantity of labour and commodities which it costs in Europe, will purchase or command a greater quantity of labour and commodities in India. It is more advantageous too to carry silver thither than gold; because in China, and the greater part of the other markets of India, the proportion between fine silver and fine gold is but as ten, or at most as twelve, to one; whereas in Europe it is as fourteen or fifteen to one. In China, and the greater part of the other markets of India, ten or at most twelve ounces of silver will purchase an ounce of gold: in Europe it requires fourteen or fifteen ounces. In the cargoes, therefore, of the greater part of the European ships which sail to India, silver has generally been one of the most valuable articles. It is the most valuable article in the Acapulco ships which sail to Manilla. The silver of the new continent seems in this manner to be one of the principal commodities by which the commerce between the two extremities of the old one is carried on; and it is by means of it, in a great measure, that  
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those distant parts of the world are connected with one another. By this annual exportation of silver to the East Indies, plate probably is somewhat dearer in Europe than it otherwise would have been; but this disadvantage is counterbalanced by the larger quantity both of labour and commodities which coined silver purchases. The former of these two effects is a very small loss; the latter a very great advantage,

### SECTION III.

#### OF THE RESTRAINTS AND ENCOURAGEMENTS OF THE COMMERCIAL SYSTEM.

From the two popular though erroneous notions, that wealth consisted in gold and silver, and that those metals could be brought into a country which had no mines only by the balance of trade, or by exporting to a greater value than it imported; it necessarily became the great object of political economy to diminish as much as possible the importation of foreign goods for home consumption, and to increase as much as possible the exportation of the produce of domestic industry. Its two great engines for enriching the country, therefore, were restraints upon importation, and encouragements to exportation.

Accordingly as these restraints and encouragements tend either to increase or diminish the value of the annual produce of the country, they must evidently tend either to increase or diminish its real wealth and industry. We shall examine what are likely to be the effects of each of them upon the annual produce of its industry.

#### 1. *Of Exportation.*

It was a maxim universally adopted among nations ignorant of the nature of commerce, that to tax exportation,

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or to prohibit it altogether, was the best means for having plenty at home. They did not consider that in this prohibition they acted directly contrary to their intention; and that the more that is exported of any commodity, the more will be raised at home, of which they themselves will always have the first offer. But the policy of the mercantile system gives ample encouragement to exportation. Yet with regard to some particular commodities it seems to follow an opposite plan. It discourages the exportation of the materials of manufacture, and of the instruments of trade, in order to give our own workmen an advantage, and to enable them to undersell those of other nations in all foreign markets.

The exportation of the materials of manufacture is sometimes discouraged by absolute prohibitions, and sometimes by high duties.

Our woollen manufacturers have been more successful than any other class of workmen in persuading the legislature that the prosperity of the nation depended upon the success and extension of their particular business. They have not only obtained a monopoly against the consumers, by an absolute prohibition of importing woollen cloths from any foreign country, but they have likewise obtained another monopoly against the sheep farmers and growers of wool, by a similar prohibition of the exportation of live sheep and wool. In order to justify their demand of such extraordinary restrictions and prohibitions, they confidently asserted that English wool was of a peculiar quality, superior to that of any other country; that the wool of other countries could not, without some mixture of it, be wrought up into any tolerable manufacture; that fine cloth could not be made without it; that England, therefore, if the exportation of it could be totally prevented, could monopolize to herself almost the whole woollen trade of the world;



world ; and thus, having no rivals, could sell at what price she pleased, and in a short time acquire the most incredible degree of wealth by the most advantageous balance of trade. This doctrine, continues Dr. Smith, like most other doctrines which are confidently asserted by any considerable number of people, was and still continues to be most implicitly believed by a much greater number. It is, however, so perfectly false that English wool is in any respect necessary for the making of fine cloth, that it is altogether unfit for it. Fine cloth is made altogether of Spanish wool. English wool cannot be even so mixt with Spanish wool as to enter into the composition without spoiling and degrading, in some degree, the fabric of the cloth.

The effect of these regulations, adds the same author, has been to depress the price of English wool, not only below what it would naturally be in the present times, but very much below what it actually was in the time of Edward III. The price of Scots wool, when in consequence of the Union it became subject to the same regulations, is said to have fallen about one half. It is observed by the very accurate and intelligent author of the *Memoirs of Wool*, the reverend Mr. John Smith, that the price of the best English wool in England is generally below what wool of a very inferior quality sells for in the market of Amsterdam. To depress the price of this commodity below what may properly be called its natural and proper price, was the avowed purpose of those regulations ; and there seems to be no doubt of their having produced the effect that was expected from them.

In consequence of excluding this commodity from an open and free market, it is likely that its quality is in some measure degraded. The degradation in the quality of English wool, if not below what it was in former times, yet below what it naturally would have been in the present state



state of improvement and cultivation, must have been, it may perhaps be supposed, very nearly in proportion to the degradation of price. As the quality depends upon the breed, upon the pasture, and upon the management and cleanliness of the sheep, during the whole progress of the growth of the fleece, the attention to these circumstances, it may naturally enough be imagined, can never be greater than in proportion to the recompense which the price of the fleece is likely to make for the labour and expense which that attention requires. It happens, however, that the goodness of the fleece depends in a great measure upon the health, growth, and bulk of the animal; the same attention which is necessary for the improvement of the carcase is, in some respects, sufficient for that of the fleece.

This degradation in the price of wool may also have somewhat diminished the demand for, and consequently the production of, sheep. For whatever regulations tend to sink the price either of wool or of raw hides below what it naturally would be, must, in an improved and cultivated country, have some tendency to raise the price of butcher's meat. The price both of the great and small cattle, which are fed upon improved and cultivated land, must be sufficient to pay the rent which the landlord, and the profit which the farmer, has reason to expect from improved and cultivated land. If it is not, they will soon cease to feed them. Whatever part of this price, therefore, is not paid by the wool and the hide must be paid by the carcase. The less there is paid for the one, the more must be paid for the other. In what manner this price is to be divided upon the different parts of the beast is indifferent to the landlords and farmers, provided it is all paid to them. In an improved and cultivated country, therefore, their interests as landlords and farmers cannot be much affected by such

such regulations, though their interests as consumers may, by the rise in the price of provisions.

From these considerations it is evident that an absolute prohibition of the exportation of wool is detrimental. The imposition of a considerable tax upon that exportation is justifiable.

A moderate duty would produce a very considerable revenue to the government. It would hurt the interest of the growers somewhat less than the prohibition, because it would not probably lower the price of wool quite so much. It would afford a sufficient advantage to the manufacturer, because, though he might not buy his wool altogether so cheap as under the prohibition, he would still buy it at least five or ten shillings cheaper than any foreign manufacturer could buy it, besides saving the freight and insurance, which the other would be obliged to pay. It is scarce possible to devise a tax which could produce any considerable revenue to the sovereign, and at the same time occasion so little inconveniency to any body.

There is one reason that should influence our legislature to permit the exportation of wool, even supposing the foregoing arguments to be inconclusive. The prohibition, notwithstanding all the penalties which guard it, does not prevent the exportation of wool. It is exported, it is well known, in great quantities. The great difference between the price in the home and that in the foreign market presents such a temptation to smuggling, that all the rigour of the law cannot prevent it. This illegal exportation is advantageous to nobody but the smuggler. Why not then make a virtue of necessity, by permitting exportation under a duty? One other measure would restore the English woollen manufacture to its pristine splendour; which is, to apply the sum arising from the tax as a premium for exporting woollen goods.

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But though the exportation of our wool upon a moderate duty would be more beneficial to the country than the absolute prohibition which it now labours under ; yet, when the price rises above a certain sum, it is as proper to prohibit its exportation as that of any other commodity, for example corn. The prohibition in this case would have the double effect of securing plenty to ourselves, and of distressing our rivals at critical times when the commodity is scarce.

The exportation of fuller's earth, or fuller's clay, supposed to be necessary for preparing and cleansing the woollen manufactures, has been subjected to nearly the same penalties as the exportation of wool. Even tobacco-pipe clay, though acknowledged to be different from fuller's clay, yet on account of their resemblance, and because fuller's clay might sometimes be exported as tobacco-pipe clay, has been laid under the same prohibitions and penalties.

By the 13th and 14th Car. II. c. 7, the exportation of raw hides has been prohibited. The horns of cattle are also subject to the same restraint.

Restraints, either by prohibitions or by taxes, extend to the exportation of goods which are partially but not completely manufactured. Woollen yarn and worsted are prohibited to be exported under the same penalties as wool. Watch-cases, clock-cases, and dial-plates for watches and clocks, have been prohibited to be exported.

By some old statutes of Edward III. Henry VIII. and Edward VI. the exportation of all metals was prohibited. Lead and tin were alone excepted ; probably on account of the great abundance of those metals ; in the exportation of which a considerable part of the trade of the kingdom in those days consisted. For the encouragement of the mining trade, the 5th of William and Mary, c. 17, exempted  
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from this prohibition iron, copper, and mundie metal made from British ore. The exportation of all sorts of copper bars, foreign as well as British, was afterwards permitted by the 9th and 10th of William III. c. 26. The exportation of unmanufactured brass, of what is called gun-metal, bell-metal, and shroff-metal, still continues to be prohibited. Brass manufactures of all sorts may be exported duty free.

It is not always true policy to discourage the exportation of our own rude materials, as is evident from the restraints imposed upon wool. Liberty of exportation gives encouragement to produce them in greater plenty at home; which consequently lowers the price to our manufacturers. Upon that principle the free and open exportation of corn (of which we shall presently speak) has been permitted, and, in Britain, even encouraged with a bounty. But where exportation of a rude material will not increase its quantity, the prohibition is good policy. For example, the exporting of rags for paper may be prohibited; because liberty of exporting will not occasion one yard more of linen cloth to be consumed.

Lyons, adds Lord Kaimes, is the city of Europe where the greatest quantity of silk stuffs is made: it is at the same time the greatest staple of raw silk; the silk of Italy, of Spain, of the Levant, and of the South of France, being there collected. The exportation of raw silk is prohibited in France, with a view to lessen its price at home, and to obstruct the silk manufacture among foreigners. The first is a gross error; the prohibition of exportation producing scarcity, not plenty: and with respect to the other view, it seems to have been overlooked, that the commerce of the silks of Italy, of Spain, and of the Levant, is not confined to France, but is open to all trading nations. This prohibition is indeed so injudicious, continues the same author, that



that without any benefit to France it has done irreparable mischief to the city of Lyons : while the commerce of raw silk, both buying and selling, was monopolized by the merchants of that city, they had it in their power to regulate the price ; but to compel foreigners to go to the fountain-head, not only raises the price by concurrence of purchasers, but deprives Lyons of a lucrative monopoly. The same blunder is repeated with respect to raw silk, spun and dyed. In Lyons, silk is prepared for the loom with more art than any where else ; and to secure the silk manufacture, the exportation of spun silk is prohibited ; which must rouse foreigners to bestow their utmost attention upon improving the spinning and dressing of silk.

The exportation of the materials of manufacture, where it is not altogether prohibited, is in many cases subjected to considerable duties.

Duties on exportation, continues the same writer, are in great favour from a notion that they are paid by foreigners. This holds sometimes ; as in the monopoly Britain formerly enjoyed of exporting coals to Holland. The duty paid on this exportation was agreeable to sound policy : it raised a considerable revenue to the public, and enabled us to cope with the Dutch in every manufacture that employed coal, such as dyeing, distilling, works of glass and of iron. But in every case where the foreign market can be supplied by others, it fails. And therefore in the above-mentioned case, the English monopoly of exporting coals to Holland would have been ruined by the coal mines in the Austrian Netherlands, had not the exportation thereof been barred by an exorbitant duty. The Dutch many years ago offered to confine themselves to those inexhaustible mines, on condition of being relieved from the duty. But the proposal was rejected. The duty on French wines exported from France, continues the same author, is equal to a bounty to the wines



of neighbouring countries. At the same time the duty is unskilfully imposed, being the same upon all wines exported, without regard to flavour or strength; which bars the commerce of small wines, though much more plentiful. A moderate duty on exportation, such as small wines can bear, would add a greater sum to the revenue, and also be more beneficial to commerce. To improve the commerce of wine in France, the exportation ought to be free, or at most charged with a moderate duty *ad valorem*. In Spain an excessive duty is laid upon the plant barrile when exported, from a persuasion that it will not grow in any other country. It is not considered, that this tax by lessening the demand is a discouragement to its culture. A moderate duty would raise more money to the public, would employ more hands, and would make that plant a permanent article of commerce. Formerly in Britain the exportation of manufactured copper was prohibited. That blunder in commercial politics was corrected by a statute in the reign of king William, permitting such copper to be exported, on paying a duty of four shillings the hundred weight. The exportation ought to have been declared free; which was done by a statute of queen Anne. But as people are apt to overdo in the rage of improvement, this statute, continues the same author, permits even unwrought copper, a raw material, to be exported. This probably was to favour copper mines: but did it not also favour foreign copper manufactures? By the 8th Geo. I. c. 15., the exportation of all goods the produce or manufacture of Great Britain, upon which any duty had been imposed by former statutes, was rendered duty free. The following goods, however, were excepted: alum, lead, lead-ore, tin, tanned leather, copperas, coals, wool, cards, white woollen cloth, lapis calaminaris, skins of all sorts, glue, coney hair or wool, hares' wool, hair of all sorts, horses, and litharge of lead. This  
statute,

statute, for the encouragement of such of our own manufactures as employ any of the articles specified, leaves them subject to all the old duties which had ever been imposed upon them, the old subsidy and one per cent. outwards.

By the same statute, a great number of foreign drugs for dyers' use are exempted from all duties upon importation. Each of them, however, is afterwards subjected to a certain duty, not indeed a very heavy one, upon exportation. Our dyers, it seems, while they thought it for their interest to encourage the importation of these drugs, by an exemption from all duties, thought it likewise for their own interest to throw some small discouragement upon their exportation. The avidity, however, which suggested this notable piece of mercantile ingenuity, most probably disappointed itself of its object. It necessarily taught the importers to be more careful than they otherwise might have been, that their importation should not exceed what was necessary for the supply of the home market. The home market was at all times likely to be more scantily supplied; the commodities were at all times likely to be somewhat dearer there than they would have been, had the exportation been rendered as free as the importation.

By the above-mentioned statute, gum Senega or gum Arabic, being among the enumerated dyeing drugs, might be imported duty free. They were subjected, indeed, to a small poundage duty amounting only to three-pence in the hundred weight upon their re-exportation. France enjoyed at that time an exclusive trade to the country most productive of those drugs, that which lies in the neighbourhood of the Senegal; and the British market could not easily be supplied by the immediate importation of them from the place of growth. By the 25th Geo. II. therefore, gum Senega was allowed to be imported (contrary to the

general dispositions of the act of navigation) from any part of Europe. As the law, however, did not mean to encourage this species of trade, so contrary to the general principles of the mercantile policy of England, it imposed a duty of ten shillings the hundred weight upon such importation, and no part of this duty was to be afterwards drawn back upon its exportation. The successful war which began in 1755 gave Great Britain the same exclusive trade to those countries which France had enjoyed before. Our manufacturers, as soon as the peace was made, endeavoured to avail themselves of this advantage, and to establish a monopoly in their own favour, both against the growers and against the importers of this commodity. By the 5th Geo. III. c. 37, therefore, the exportation of gum Senega from his majesty's dominions in Africa was confined to Great Britain, and was subjected to the same restrictions, regulations, forfeitures, and penalties, as that of the enumerated commodities of the British colonies in America and the West Indies. Its importation was subjected to a small duty of six-pence the hundred weight, but its re-exportation was subjected to the enormous duty of one pound ten shillings the hundred weight. It was the intention of our manufacturers that the whole produce of those countries should be imported into Great Britain, and, in order that they themselves might be enabled to buy it at their own price, that no part of it should be exported again, but at such an expense as would sufficiently discourage that exportation. Their avidity, however, upon this as well as upon many other occasions, disappointed itself of its object. The enormous duty presented such a temptation to smuggling, that great quantities of this commodity were clandestinely exported, probably to all the manufacturing countries of Europe, but particularly to Holland, not only from  
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Great Britain but from Africa. Upon this account, by the 14th Geo. III. c. 10; this duty upon exportation was reduced to five shillings the hundred weight.

In the book of rates, according to which the old subsidy was levied, beaver skins were estimated at six shillings and eight-pence a piece, and the different subsidies and imposts, which before the year 1722 had been laid upon their importation, amounted to one fifth part of the rate, or to sixteen-pence upon each skin; all of which, except half the old subsidy, was drawn back upon exportation. This duty upon the importation of so important a material of manufacture had been thought too high, and in the year 1722 the rate was reduced to two shillings and six-pence; which reduced the duty upon importation to six-pence, and of this only one half was to be drawn back upon exportation. The same successful war put the country most productive of beaver under the dominion of Great Britain; and beaver skins being among the enumerated commodities, their exportation from America was consequently confined to the market of Great Britain. Our manufacturers soon bethought themselves of the advantage they might make of this circumstance, and in the year 1764 the duty upon importation of beaver skins was reduced to one penny; but the duty upon exportation was raised to seven-pence per skin, without any drawback of the duty upon importation. By the same law, a duty of eighteen-pence the pound was imposed upon the exportation of beaver wool or wombs, without making any alteration upon the importation of that commodity, which when imported by British merchants, and in British shipping, amounted at that time to between four-pence and five-pence the piece.

With regard to the exportation of corn, Dr. Smith observes that if ever it is prohibited, it ought to be prohibited when at a very high price. The liberal system of a free  
exportation

exportation and a free importation, continues the same author, would be highly beneficial, if it were adopted by all nations. But, to the incalculable injury of mankind, very few countries have adopted this liberal system. The freedom of the corn trade is almost every where restrained, and in many countries is confined by such absurd regulations, as frequently aggravate the unavoidable misfortune of a dearth into the dreadful calamity of a famine.

When Sully entered on the administration of the French finances, the corn in France was at an exorbitant price, occasioned by the neglect of husbandry during the civil war. That sagacious minister discovered the secret of re-establishing agriculture, and of reducing the price of corn ; which is, to allow a free exportation. So rapid was the success of that bold and politic measure, that in a few years France became the granary of Europe ; and what may at present appear wonderful, we find in the English records, in the year 1621, bitter complaints of the French underselling them in their own markets. Colbert, who fortunately for us had imbibed the common error, renewed the ancient prohibition of exporting corn, hoping to have it cheap at home for his manufacturers. But he was in a gross mistake ; for that prohibition has been the cause of many famines in France since that time. The corn trade in France lay long under great discouragements ; and the French ministry continued long blind to the interest of their country. At last edicts were issued, authorizing the commerce of corn to be absolutely free, whether sold within the kingdom or exported. The generality, however, continued blind. In the year 1768, the badness of the harvest having occasioned a famine, the distresses of the people were excessive, and their complaints universal. Overlooking altogether the bad harvest, they from amazing partiality attributed their misery to the new law. It was in vain inculcated,



culeated, that freedom in the corn trade encourages agriculture: the popular opinion was adopted even by most of the Parliaments: so difficult it is to eradicate established prejudice. In Turkey about thirty years ago, continues Lord Kains, a grand vizier permitted corn to be exported more freely than had been done formerly, a bushel of wheat being sold at that time under seventeen-pence. Every nation flocked to Turkey for corn; and in particular no fewer than three hundred French vessels, from twenty to two hundred tons, entered Smyrna bay in one day. The Janissaries and populace took the alarm, fearing that all the corn would be exported, and that a famine would ensue. In Constantinople they grew mutinous, and could not be appeased till the vizier was strangled, and his body thrown out to them. His successor, who resolved not to split upon the same rock, prohibited exportation absolutely. In that country rent is paid in proportion to the product of the land; and the farmers, who saw no demand, neglected tillage. In less than three years the bushel of wheat rose to six shillings, and the distresses of the people became intolerable. To this day, the fate of the good vizier is lamented. Formerly in Spain there was plenty of corn for twenty millions of inhabitants, with a surplus for the great city of Rome; but for many years back, on account of the absolute prohibition against exporting corn, there has not been sufficient for seven millions, its present inhabitants.

In great states, says Dr. Smith, the unlimited freedom of exportation of corn is much less dangerous than in small ones; for, the growth being much greater, the supply can be seldom much affected by any quantity of corn that is likely to be exported. In a Swiss canton, or in some of the little states of Italy, it may perhaps sometimes be necessary to restrain the exportation of corn. In such great countries as France and England it scarce ever can. Besides,

to hinder the farmer from sending his goods at all times to the best market, is evidently to sacrifice the ordinary laws of justice to an idea of public utility, to a sort of reasons of state; an act of legislative authority which ought to be exercised only, and can be pardoned only, in cases of the most urgent necessity.

Unless more corn is either usually grown, or usually imported into the country, observes the same author, than what is usually consumed in it, the supply of the home market can never be very plentiful. For unless the surplus can, in all ordinary cases, be exported, the growers will be careful never to grow more, and the importers never to import more, than what the bare consumption of the home market requires. That market will very seldom be overstocked; but it will generally be understocked, the people whose business it is to supply it being generally afraid lest their goods should be left upon their hands. The prohibition of exportation limits the improvement and cultivation of the country to what the supply of its own inhabitants requires. The freedom of exportation enables it to extend cultivation for the supply of foreign nations. By the discouragement of importation, the supply of the market, even in times of great scarcity, is confined to the home growth.

The exportation of British manufactures to our American colonies ought to meet with such encouragement as to prevent them from rivalling us: it would be a gross blunder to encourage their manufactures, by imposing a duty on what we exported to them. We ought rather to give a bounty on exportation; which, by underselling them in their own markets, would quash every attempt at rivalry.

I close this branch, continues Lord Kaimes, with a commercial lesson, to which every other consideration ought to yield. The trade of a nation depends for the most part on very delicate circumstances, and requires to be carefully nursed.

nursed. Foreigners, in particular, ought to be flattered and encouraged, that they may prefer us before others. Nor ought we ever to rely entirely on our natural advantages ; for it is not easy to foresee what may occur to counterbalance them. As this reflection is no less obvious than weighty, facts will be more effectual than argument for making a deep impression. The Swiss some years ago imported all their wines from the king of Sardinia's dominions. The king laid a high duty on these wines, knowing the Swiss had not ready access to any other wine country. He did not foresee that this high duty was equal to a premium for cultivating the vine at home. They succeeded ; and now are provided with wine of their own growth. The city of Lyons, by making silver-thread in perfection, had maintained a monopoly of that article against foreigners as well as natives. But a high duty on the exporting of it, in order to monopolize also the manufacture of silver-lace, has, by exciting foreigners to improve their own silver-thread and silver-lace, deprived them of both monopolies, by the very means employed for securing both. Spanish oil exported to America would be a great article of commerce, were it not barred by a heavy duty on exportation equal almost to a prohibition : and the Spanish Americans, for want of oil, are reduced to use fat and butter. The prohibition of planting vines in Mexico, and the excessive duty on the importation of Spanish wines into that country, introduced a spirit drawn from the sugar-cane.

Beside heavy duties, commerce with foreigners has been distressed by many unwary regulations. The herring fishery, which is now an immense article of commerce, was engrossed originally by the Scots. But grasping at all advantages, the royal boroughs of Scotland, in the reign of James the Second, prohibited their fishermen to sell herrings at sea to foreigners ; ordering, that the herrings should  
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be first landed, in order that they themselves might be first served. Such was the policy of those times. But behold the consequence: the Netherlanders, and people of the Hans towns, being prohibited from purchasing as formerly, became fishers themselves, and cut the Scots out of that profitable branch of trade. The tar company of Sweden, taking for granted that the English could not otherwise be supplied, refused to let them have any pitch or tar, even for ready money, unless permitted to be imported into England in Swedish bottoms; and consequently in such quantities only as the company should be pleased to furnish. This hardship moved the parliament to give a bounty for pitch and tar made in our own colonies; which has rendered us independent of Sweden. The Dutch, excited by the profitable trade of Portugal with the East Indies, attempted a north-east passage to China; and that proving abortive, they set on foot a trade with Lisbon for East India commodities. Portugal was at that time subject to the king of Spain; and the Dutch, though at war with Spain, did not doubt of their being well received in Portugal, with which kingdom they had no cause to quarrel. But the king of Spain, overlooking not only the law of nations, but even his own interest as king of Portugal, confiscated at short hand the Dutch ships and their cargoes in the harbour of Lisbon. That unjust and impolitic treatment provoked the Dutch to attempt an East India trade, which probably they would not otherwise have thought of; and they were so successful as to supplant the Portuguese in every quarter. And thus the king of Spain, by a gross error in politics, exalted his enemies to be a powerful maritime state. Had he encouraged the Dutch to trade with Lisbon, other nations must have resorted to the same market. Portugal thereby would have been raised to such a height of maritime power, as to be afraid of no rival. The  
Dutch

Dutch would not have thought of coping with them, nor would any other nation.

We proceed to the encouragements to exportation, which are by means of bounties and drawbacks.

Bounties are given for the encouragement of an infant manufacture, or of such sorts of industry of other kinds as are supposed to deserve particular favour, or of those branches of trade only which cannot be carried on without them. But every branch of trade in which the merchant can sell his goods for a price which replaces to him, with the ordinary profits of stock, the whole capital employed in preparing and sending them to market, can be carried on without a bounty. Those trades only require bounties in which the merchant is obliged to sell his goods for a price which does not replace to him his capital, together with the ordinary profit; or in which he is obliged to sell them for less than it really costs him to send them to market.

Bounties upon the exportation of any home-made commodity are lable, first, to that general objection which may be made to all the different expedients of the mercantile system; the objection of forcing some part of the industry of the country into a channel less advantageous than that in which it would run of its own accord; and, secondly, to the particular objection of forcing it, not only into a channel that is less advantageous, but into one that is actually disadvantageous; the trade which cannot be carried on but by means of a bounty being necessarily a losing trade.

But if any particular manufacture is necessary for the defence of the society, and if such manufacture cannot otherwise be supported at home, a bounty for its encouragement may be advisable. The bounties upon the exportation of British-made sail-cloth, and British-made gunpowder,



powder, may perhaps both be vindicated upon this principle.

To encourage the production of any commodity, a bounty on production, one would imagine, would have a more direct operation than one upon exportation. It would, besides, impose only one tax upon the people; that which they must contribute in order to pay the bounty. Instead of raising, it would tend to lower the price of the commodity in the home market; and thereby, instead of imposing a second tax upon the people, it might, at least in part, repay them for what they had contributed to the first. Bounties upon production, however, have been very rarely granted. The prejudices established by the commercial system have taught us to believe that natural wealth arises more immediately from exportation than from production. It has, accordingly, been more favoured, as the more immediate means of bringing money into the country. Bounties upon production, it has been said, too, have been found by experience more liable to frauds than those upon exportation. How far this is true, continues Dr. Smith, I know not. That bounties upon exportation have been abused to many fraudulent purposes is very well known. But it is not the interest of merchants and manufacturers, the great inventors of all these expedients, that the home market should be overstocked with their goods, an event that a bounty upon production might sometimes occasion. A bounty upon exportation, by enabling them to send abroad their surplus part, and to keep up the price of what remains in the home market, effectually prevents this. Of all the expedients of the mercantile system, accordingly, it is the one of which they are the fondest. I have known the different undertakers, adds the same author, of some particular works agree privately among themselves to give a bounty out of their own pockets upon the exportation of  
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a certain proportion of the goods which they dealt in. This expedient succeeded so well that it more than doubled the price of their goods in the home market, notwithstanding a very considerable increase in the produce.

What is called a bounty is sometimes no more than a drawback, and consequently is not liable to the same objections as that which is properly a bounty. The bounty, for example, upon refined sugar exported, may be considered as a drawback of the duties upon the brown and muscovado sugars, from which it is made; the bounty upon wrought silk exported, a drawback upon raw and thrown silk imported; the bounty upon gunpowder exported, a drawback upon brimstone and salt-petre imported. In the language of the customs, those allowances only are called drawbacks which are given upon goods exported in the same form in which they are imported. When that form has been so altered by manufacture of any kind as to come under a new denomination, they are called bounties.

As to the bounty on corn, Dr. Smith observes, that system of laws which is connected with the establishment of the bounty seems to deserve no part of the praise which has been bestowed upon it. The improvement and prosperity of Great Britain, which has been so often ascribed to those laws, may very easily be accounted for by other causes. That security which the laws in Great Britain give to every man, that he shall enjoy the fruits of his labour, is alone sufficient to make any country flourish, notwithstanding these and twenty other absurd regulations of commerce; and this security was perfected by the Revolution, much about the same time that the bounty was established. The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone and without any assistance not only capable of carrying on the so-

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ciety to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations; though the effect of these obstructions is always more or less either to encroach upon its freedom, or to diminish its security. In Great Britain industry is perfectly secure; and though it is far from being perfectly free, it is as free or freer than in any other part of Europe.

The average price of corn, it has been said, has fallen considerably since the establishment of the bounty. The average price of corn began to fall somewhat towards the end of the seventeenth century, and has continued to do so during the course of the sixty-four first years of the last century. But this event, says Dr. Smith, supposing it to be real, as I believe it to be, must have happened in spite of the bounty, and cannot possibly have happened in consequence of it. It has happened in France, as well as in England, though in France there was not only no bounty, but till 1764 the exportation of corn was subjected to a general prohibition. This gradual fall in the average price of grain, it is probable, therefore, is ultimately owing neither to the one regulation nor to the other, but to the gradual and insensible rise in the real value of silver which has taken place in the general market of Europe during the course of the present century. It seems to be altogether impossible that the bounty could ever contribute to lower the price of grain.

In years of plenty the bounty, by occasioning an extraordinary exportation, necessarily keeps up the price of corn in the home market above what it would naturally fall to. To do so was the avowed purpose of the institution. In years of scarcity, though the bounty is frequently suspended, yet the great exportation which it occasions in years of plenty must frequently hinder more or less the  
plenty

plenty of one year from relieving the scarcity of another. Both in years of plenty and in years of scarcity, therefore, the bounty necessarily tends to raise the money price of corn somewhat higher than it otherwise would be in the home market.

That in the actual state of tillage the bounty must necessarily have this tendency will not, I apprehend, continues Dr. Smith, be disputed by any reasonable person. But it has been thought by many people, that it tends to encourage tillage, and that in two different ways; first, by opening a more extensive foreign market to the corn of the farmer, it tends, they imagine, to increase the demand for, and consequently the production of, the commodity; and secondly, by securing to him a better price than he could otherwise expect in the actual state of tillage, it tends, they suppose, to encourage tillage. This double encouragement must, they imagine, in a long period of years, occasion such an increase in the production of corn, as may lower its price in the home market much more than the bounty can raise it, in the actual state in which tillage may, at the end of that period, happen to be.

I answer, adds the same excellent author, that whatever extension of the foreign market can be occasioned by the bounty must, in every particular year, be altogether at the expense of the home market; as every bushel of corn which is exported by means of the bounty, and which would not have been exported without the bounty, would have remained in the home market to increase the consumption, and to lower the price of that commodity. The corn bounty, it is to be observed, as well as every other bounty upon exportation, imposes two different taxes upon the people; first, the tax which they are obliged to contribute in order to pay the bounty; and secondly, the tax which arises from the advanced price of the commodity in the  
home

home market, and which, as the whole body of the people are the purchasers of the corn, must in this particular commodity be paid by the whole body of the people. In this particular commodity, therefore, this second tax is by much the heavier of the two. Let us suppose that, taking one year with another, the bounty of five shillings upon the exportation of the quarter of wheat raises the price of that commodity in the home market only six-pence the bushel, or four shillings the quarter, higher than it otherwise would have been in the actual state of the crop. Even upon this very moderate supposition, the great body of the people, over and above contributing the tax which pays the bounty of five shillings upon every quarter of wheat exported, must pay another of four shillings upon every quarter which they themselves consume. But according to the very well informed author of the tracts upon the corn trade, the average proportion of the corn exported to that consumed at home is not more than that of one to thirty-one. For every five shillings, therefore, which they contribute to the payment of the first tax, they must contribute six pounds four shillings to the payment of the second. So very heavy a tax upon the first necessary of life, continues Dr. Smith, must either reduce the subsistence of the labouring poor, or it must occasion some augmentation in their pecuniary wages proportionable to that in the pecuniary price of their subsistence. So far as it operates in the one way, it must reduce the ability of the labouring poor to educate and bring up their children, and must so far tend to restrain the population of the country. So far as it operates in the other, it must reduce the ability of the employers of the poor to employ so great a number as they otherwise might do, and must so far tend to restrain the industry of the country. The extraordinary exportation of corn, therefore, occasioned by the bounty, not only in every particular year,



year, diminishes the home just as much as it extends the foreign market and consumption, but, by restraining the population and industry of the country, its final tendency is to stunt and restrain the gradual extension of the home market; and thereby, in the long-run, rather to diminish than to augment the whole market and consumption of corn.

This enhancement of the money price of corn, however, it has been thought, by rendering that commodity more profitable to the farmer, must necessarily encourage its production.

I answer, adds Dr. Smith, that this might be the case if the effect of the bounty was to raise the real price of corn, or to enable the farmer with an equal quantity of it to maintain a greater number of labourers in the same manner, whether liberal, moderate, or scanty, than other labourers are commonly maintained in his neighbourhood. But neither the bounty, it is evident, nor any other human institution, can have any such effect. It is not the real but the nominal price of corn which can in any considerable degree be affected by the bounty. And though the tax which that institution imposes upon the whole body of the people may be very burthensome to those who pay it, it is of very little advantage to those who receive it.

The sooner bounties cease, and the lower they are, so much the better. And therefore the 13th of the present king, c. 43, which takes off the old bounty of five shillings upon the exportation of wheat as soon as the price rises to forty-four shillings the quarter, instead of forty-eight, the price at which it ceased before, is founded on good policy.

By the same statute, the high duties upon importation for home consumption are taken off as soon as the price of middling wheat rises to forty-eight shillings the quarter,

thus opening the home-market to foreign supplies at prices considerably lower than before.

We come now to the second mode of encouragement to exportation, which is termed a drawback.

Drawbacks are given upon two different occasions. When the home manufactures are subject to any excise or duty, either the whole or a part of it is frequently drawn back upon their exportation; and when foreign goods liable to a duty are imported in order to be exported again, either the whole or a part of this duty is sometimes given back upon such exportation.

Of the encouragements given by the mercantile system to exportation, what are called drawbacks seem to be the most reasonable. To allow the merchant to draw back upon exportation either the whole or a part of whatever excise or inland duty is imposed upon domestic industry, can never occasion the exportation of a greater quantity of goods than what would have been exported had no duty been imposed. Such encouragements do not tend to turn towards any particular employment a greater share of the capital of the country than what would go to that employment of its own accord, but only to hinder the duty from driving away any part of that share to other employments. They tend not to overturn that balance which naturally establishes itself among the various employments of the society, but to hinder it from being overturned by the duty. They tend not to destroy, but to preserve, what it is in most cases advantageous to preserve, the natural division and distribution of labour in the society.

The same thing may be said of the drawbacks upon the re-exportation of foreign goods imported, which in Great Britain generally amount to by much the largest part of the duty upon importation. By the second of the rules annexed to the act of parliament, which imposed what is now  
called

called the old subsidy, every merchant, whether English or alien, was allowed to draw back half that duty upon exportation; the English merchant, provided the exportation took place within twelve months; the alien, provided it took place within nine months. Wines, currants, and wrought silks were the only goods which did not fall within this rule, having other and more advantageous allowances. The duties imposed by this act of parliament were at that time the only duties upon the importation of foreign goods. The term upon which this and all other drawbacks could be claimed was afterwards (by 7th Geo. I. c. 21, s. 10) extended to three years.

The duties which have been imposed since the old subsidy are, the greater part of them, wholly drawn back upon exportation. This general rule, however, is liable to a great number of exceptions.

Upon the exportation of some foreign goods, of which it was expected that the importation would greatly exceed what was necessary for the home consumption, the whole duties are drawn back, without retaining even half the old subsidy.

The revenue of the customs, continues Dr. Smith, instead of suffering, profits from such drawbacks, by that part of the duty which is retained. If the whole duties had been retained, the foreign goods upon which they are retained could seldom have been exported, nor consequently imported, for want of a market. The duties, therefore, of which a part is retained, would never have been paid.

These reasons seem sufficiently to justify drawbacks, and would justify them, though the whole duties, whether upon the produce of domestic industry or upon foreign goods, were always drawn back upon exportation. The revenue of excise would in this case, indeed, suffer a little, and that of the customs a good deal more; but the natural balance

industry, the natural division and distribution of labour, which is always more or less disturbed by such duties, would be more nearly re-established by such a regulation.

These reasons, however, will justify drawbacks only upon exporting goods to those countries which are altogether foreign and independent, not to those in which our merchants and manufacturers enjoy a monopoly. A drawback, for example, upon the exportation of European goods to our American colonies will not always occasion a greater exportation than what would have taken place without it. By means of the monopoly which our merchants and manufacturers enjoy there, the same quantity might frequently, perhaps, be sent thither, though the whole duties were retained. The drawback, therefore, may frequently be pure loss to the revenue of excise and customs, without altering the state of the trade, or rendering it in any respect more extensive. In allowing the same drawbacks upon the re-exportation of the greater part of European and East India goods to the colonies, as upon their re-exportation to any independent country, the interest of the mother country was sacrificed to it, even according to the mercantile ideas of that interest. It was for the interest of the merchants to pay as little as possible for the goods which they sent to the colonies, and consequently to get back as much as possible of the duties which they advanced upon their importation into Great Britain. They might thereby be enabled to sell in the colonies either the same quantity of goods with a greater profit, or a greater quantity with the same profit; and, consequently, to gain something in the one way or the other. It was likewise for the interest of the colonies to get all such goods as cheap and in as great abundance as possible. But this might not always be for the interest of the mother country. She might frequently suffer both in her revenue, by giving back  
a great



a great part of the duties which had been paid upon the importation of such goods ; and in her manufactures, by being undersold in the colony market, in consequence of the easy terms upon which foreign manufactures could be carried thither by means of those drawbacks. The progress of the linen manufacture of Great Britain, it is commonly said, has been a good deal retarded by the drawbacks upon the re-exportation of German linen to the American colonies.

## *2. Of Importation.*

By restraining either by high duties, or by absolute prohibitions, the importation of such goods from foreign countries as can be produced at home, the monopoly of the home market is more or less secured to the domestic industry employed in producing them. Thus, the prohibition of importing either live cattle or salt provisions from foreign countries, secures to the graziers of Great Britain the monopoly of the home market for butchers' meat. The high duties upon the importation of corn, which in times of moderate plenty amount to a prohibition, give a like advantage to the growers of that commodity. The prohibition of the importation of foreign woollens is equally favourable to the woollen manufactures. The silk manufacture, though altogether employed upon foreign materials, has lately obtained the same advantage. The linen manufacture, continues Dr. Smith, has not yet obtained it, but is making rapid strides towards it. Many other sorts of manufactures have in the same manner obtained in Great Britain, either altogether or very nearly, a monopoly against their countrymen. The variety of goods of which the importation into Great Britain is prohibited, either absolutely or under certain circumstances, greatly exceeds what can easily be suspected



suspected by those who are not acquainted with the laws of the customs.

That this monopoly of the home market frequently gives great encouragement to that particular species of industry which enjoys it, and frequently turns towards that employment a greater share of both the labour and stock of the society than would otherwise have gone to it, cannot be doubted. But though a particular manufacture may by such regulations be sometimes acquired sooner than it would have been otherwise, and after a certain time may be made at home as cheap or cheaper than in a foreign country, it will by no means follow that the same total, either of its industry or of its revenue, can ever be augmented by such regulation, or the most advantageous direction given to it. The industry of the society can augment only in proportion as its capital augments, and its capital can augment only in proportion to what can be gradually saved out of its revenue. But the immediate effect of every such regulation is to diminish its revenue; and what diminishes its revenue is not certainly very likely to augment its capital faster than it would have augmented of its own accord, had both capital and industry been left to find out their natural employments<sup>1</sup>.

This

<sup>1</sup> Monopolies hinder the capital of a country, whatever may at any particular time be the extent of that capital, from maintaining so great a quantity of productive labour as it would otherwise maintain, and from affording so great a revenue to the industrious inhabitants as it would otherwise afford. But as capital would be increased only by savings from revenue, the monopoly, by hindering it from affording so great a revenue as it would otherwise afford, necessarily hinders it from increasing so fast as it would otherwise increase, and consequently from maintaining a still greater quantity of productive labour, and affording a still greater revenue to the industrious inhabitants of that country. One great original source of revenue, therefore, the wages of labour, the monopoly must necessarily have rendered at all times less abundant than it otherwise would have been.

By raising the rate of mercantile profit, the monopoly discourages the improvement of land. The profit of the improvement depends upon the difference between what the land actually produces, and what, by the application of a certain capital, it can be made to produce. If this difference  
affords

This monopoly of the home market is a favourite part of the mercantile system. It must, however, be admitted, that if the free importation of foreign manufactures were permitted, several of the home manufactures would probably suffer, and some of them perhaps go to ruin altogether, and a considerable part of the stock and industry at present employed in them would be forced to find out some other employment. But the freest importation of the rude produce of the soil could have no such effect upon the agriculture of the country. And therefore the free importation of foreign lean cattle, salt provisions, and corn, can have little effect upon the home productions. The small number of Irish cattle imported since their importation was permitted, together with the good price at which lean cattle continue to sell, seem to demonstrate that even the breeding countries of Great Britain are never likely to be much af-

affords a greater profit than what can be drawn from an equal capital in any mercantile employment, the improvement of land will draw capital from all mercantile employments. If the profit is less, mercantile employments will draw capital from the improvement of land. Whatever therefore raises the rate of mercantile profit, either lessens the superiority or increases the inferiority of the profit of improvement; and in the one case hinders capital from going to improvement, and in the other draws capital from it. But by discouraging improvement, the monopoly necessarily retards the natural increase of another great original source of revenue, the rent of land. By raising the rate of profit, too, the monopoly necessarily keeps up the market rate of interest higher than it otherwise would be. But the price of land in proportion to the rent which it affords, the number of years purchase which is commonly paid for it, necessarily falls as the rate of interest rises, and rises as the rate of interest falls. The monopoly, therefore, hurts the interest of the landlord two different ways; by retarding the natural increase, first, of his rent, and secondly, of the price which he could get for his land in proportion to the rent which it affords.

The monopoly, indeed, raises the rate of mercantile profit, and thereby augments somewhat the gain of our merchants. But as it obstructs the natural increase of capital, it tends rather to diminish than to increase the sum total of the revenue which the inhabitants of the country derive from the profits of stock; a small profit upon a great capital generally affording a greater revenue than a great profit upon a small one. The monopoly raises the profit, but it hinders the sum of profit from rising so high as it otherwise would do.

All the original sources of revenue, the wages of labour, the rent of land, and the profits of stock, the monopoly renders much less abundant than they otherwise would be. To promote the little interest of one order of men, it hurts the interest of all other orders of men in that country, and of all men in all other countries.

fectured by the free importation of Irish cattle. The freest importation of foreign cattle, besides, can have no other effect than to hinder the breeding countries of Great Britain from taking advantage of the increasing population and improvement of the rest of the kingdom, from raising their price to an exorbitant height, and from laying a real tax upon all the more cultivated parts of the country.

The quantity of foreign corn imported, even in times of the greatest scarcity, may also satisfy our farmers that they can have nothing to fear from the freest importation. The average quantity imported one year with another, continues Dr. Smith, amounts only, according to the very well informed author of the tracts upon the corn trade, to twenty-three thousand seven hundred and twenty-eight quarters of all sorts of grain, and does not exceed the five hundredth and seventy-first part of the annual consumption. But as the bounty upon corn occasions a greater exportation in years of plenty, so it must of consequence occasion a greater importation in years of scarcity, than in the actual state of tillage would otherwise take place. By means of it the plenty of one year does not compensate the scarcity of another; and as the average quantity exported is necessarily augmented by it, so must likewise, in the actual state of tillage, the average quantity imported. If there were no bounty, as less corn would be exported, so it is probable that, one year with another, less would be imported than at present.

To prohibit by a perpetual law the importation of foreign corn and cattle, is in reality to enact, that the population and industry of the country shall at no time exceed what the rude produce of its own soil can maintain<sup>1</sup>.

There

<sup>1</sup> No nation derives greater benefit from a free and unrestrained commerce than a landed nation. It can never be the interest of landed nations, observes Dr. Smith, to discourage or distress the industry of mercantile states,

There seem, however, to be two cases, adds the same author, in which it will generally be advantageous to lay some burden upon foreign for the encouragement of domestic industry.

The first is, when some particular sort of industry is necessary for the defence of the country. The defence of Great Britain, for example, depends very much upon the number of its sailors and shipping. The act of navigation, therefore, very properly endeavours to give the sailors and shipping of Great Britain the monopoly of the trade of their own country, in some cases by absolute prohibitions, and in others by heavy burdens upon the shipping of foreign countries.

The act of navigation, continues Dr. Smith, is not  
favourable

states, by imposing high duties upon their trade, or upon the commodities which they furnish. Such duties, by rendering those commodities dearer, could serve only to sink the real value of the surplus produce of their own land, with which, or, what comes to the same thing, with the price of which, those commodities are purchased. Such duties could serve only to discourage the increase of that surplus produce, and consequently the improvement and cultivation of their own land. The most effectual expedient, on the contrary, for raising the value of the surplus produce, for encouraging its increase, and consequently the improvement and cultivation of their land, would be to allow the most perfect freedom to the trade of all such mercantile nations.

This perfect freedom of trade would even be the most effectual expedient for supplying them, in due time, with all the artificers, manufacturers and merchants, whom they wanted at home, and for filling up in the properest and most advantageous manner that very important void which they felt there.

The continual increase of the surplus produce of their land would, in due time, create a greater capital than what could be employed with the ordinary rate of profit in the improvement and cultivation of land; and the surplus part of it would naturally turn itself to the employment of artificers and manufacturers at home. But those artificers and manufacturers, finding at home both the materials of their work and the fund of their subsistence, might immediately, even with much less art and skill, be able to work as cheap as the little artificers and manufacturers of such mercantile states, who had both to bring from a greater distance. Even though, from want of art and skill, they might not for some time be able to work as cheap; yet, finding a market at home, they might be able to sell their work there as cheap as that of the artificers and manufacturers of such mercantile states which could not be brought to that market but from so great a distance; and as their art and skill improved, they would soon be able to sell it cheaper. The artificers and manufacturers of such mercantile states, therefore, would immediately be rivalled in the market of those



favourable to foreign commerce, or to the growth of that opulence which can arise from it. The interest of a nation in its commercial relations to foreign nations is, like that of a merchant with regard to the different people with whom he deals, to buy as cheap and to sell as dear as possible. But it will be most likely to buy cheap, when by the most perfect freedom of trade it encourages all nations to bring to it the goods which it has occasion to purchase; and, for the same reason, it will be most likely to sell dear, when its markets are thus filled with the greatest number of buyers. The act of navigation, it is true, lays no burden upon foreign ships that come to export the produce of British industry. Even the ancient aliens duty, which used to be paid upon all goods exported as well as imported, has, by several subsequent acts, been taken off from the

those landed nations, and soon after undersold and jostled out of it altogether. The cheapness of the manufactures of those landed nations, in consequence of the gradual improvements of art and skill, would, in due time, extend their sale beyond the home market, and carry them to many foreign markets, from which they would in the same manner gradually jostle out many of the manufacturers of such mercantile nations.

This continual increase both of the rude and manufactured produce of those landed nations would in due time create a greater capital than could, with the ordinary rate of profit, be employed either in agriculture or in manufactures. The surplus of this capital would naturally turn itself to foreign trade, and be employed in exporting, to foreign countries, such parts of the rude and manufactured produce of its own country as exceeded the demand of the home market. In the exportation of the produce of their own country, the merchants of a landed nation would have an advantage of the same kind over those of mercantile nations, which its artificers and manufacturers had over the artificers and manufacturers of such nations; the advantage of finding at home that cargo, and those stores and provisions, which the others were obliged to seek at a distance. With inferior art and skill in navigation, therefore, they would be able to sell that cargo as cheap in foreign markets as the merchants of such mercantile nations; and with equal art and skill they would be able to sell it cheaper. They would soon, therefore, rival those mercantile nations in this branch of foreign commerce, and in due time would jostle them out of it altogether.

According to this liberal and generous system, therefore, the most advantageous method in which a landed nation can raise up artificers, manufacturers and merchants of its own, is to grant the most perfect freedom of trade to the artificers, manufacturers and merchants of all other nations. It thereby raises the value of the surplus produce of its own land, of which the continual increase gradually establishes a fund, which in due time necessarily raises up all the artificers, manufacturers and merchants whom it has occasion for.

greater



greater part of the articles of exportation. But if foreigners, either by prohibitions or high duties, are hindered from coming to sell, they cannot always afford to come to buy; because, coming without a cargo, they must lose the freight from their own country to Great Britain. By diminishing the number of sellers, therefore, we necessarily diminish that of buyers, and are thus likely not only to buy foreign goods dearer, but to sell our own cheaper, than if there was a more perfect freedom of trade. As defence, however, is of much more importance than opulence, the act of navigation is, perhaps, the wisest of all the commercial regulations of England.

The second case in which it will generally be advantageous to lay some burden upon foreign for the encouragement of domestic industry, is, when some tax is imposed at home upon the produce of the latter. In this case, it seems reasonable that an equal tax should be imposed upon the like produce of the former. This would not give the monopoly of the home-market to domestic industry, nor turn towards a particular employment a greater share of the stock and labour of the country, than what would naturally go to it. It would only hinder any part of what would naturally go to it from being turned away, by the tax, into a less natural direction, and would leave the competition between foreign and domestic industry, after the tax, as nearly as possible upon the same footing as before it. In Great Britain, when any such tax is laid upon the produce of domestic industry, it is usual at the same time, in order to stop the clamorous complaints of our merchants and manufacturers, that they will be undersold at home, to lay a much heavier duty upon the importation of all foreign goods of the same kind.

As there are two cases in which it will generally be advantageous to lay some burden upon foreign for the encouragement of domestic industry, so there are two others  
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in which it may sometimes be a matter of deliberation ; in the one, how far it is proper to continue the free importation of certain foreign goods ; and in the other, how far, or in what manner, it may be proper to restore that free importation after it has been for some time interrupted.

The case in which it may be sometimes a matter of deliberation how far it is proper to continue the free importation of certain foreign goods, is, when some foreign nations restrain by high duties or prohibitions the importation of some of our manufactures into their country. Revenge in this case naturally dictates retaliation, and that we should impose the like duties and prohibitions upon the importation of some or all of their manufactures into ours.

The case in which it may sometimes be a matter of deliberation, how far, or in what manner, it is proper to restore the free importation of foreign goods, after it has been for some time interrupted, is, when particular manufactures, by means of high duties or prohibitions upon all foreign goods which can come into competition with them, have been so far extended as to employ a great multitude of hands. Humanity may in this case require that the freedom of trade should be restored only by slow gradations, and with a good deal of reserve and circumspection. Were those high duties and prohibitions taken away all at once, cheaper foreign goods of the same kind might be poured so fast into the home-market, as to deprive all at once many thousands of our people of their ordinary employment and means of subsistence.

To lay extraordinary restraints upon the importation of goods of almost all kinds, from those particular countries with which the balance of trade is supposed to be disadvantageous, is, continues Dr. Smith, the second expedient by which the commercial system proposes to increase the quantity of gold and silver. Thus in Great Britain Silesia lawns  
may

may be imported for home consumption upon paying certain duties. But French cambrics and lawns are prohibited to be imported, except into the port of London, there to be warehoused for exportation. Higher duties are imposed upon the wines of France than upon those of Portugal, or indeed of any other country. By what is called the impost of 1692, a duty of five-and-twenty per cent. of the rate or value was laid upon all French goods; while the goods of other nations were, the greater part of them, subjected to lighter duties, seldom exceeding five per cent. The wine, brandy, salt, and vinegar of France were indeed excepted; these commodities being subjected to other heavy duties, either by other laws, or by particular clauses of the same law. In 1696, a second duty of twenty-five per cent., the first not having been thought a sufficient discouragement, was imposed upon all French goods except brandy; together with a new duty of five-and-twenty pounds upon the tun of French wine, and another of fifteen pounds upon the tun of French vinegar. French goods have never been omitted in any of those general subsidies or duties of five per cent. which have been imposed upon all or the greater part of the goods enumerated in the book of rates. If we count the one third and two third subsidies as making a complete subsidy between them, there have been five of these general subsidies; so that before the commencement of the American war seventy-five per cent. may be considered as the lowest duty to which the greater part of the goods of the growth, produce, or manufacture of France were liable. But upon the greater part of goods those duties are equivalent to a prohibition. The French in their turn treated our goods and manufactures just as hardly. Those mutual restraints put an end to almost all fair commerce between the two nations, and smugglers were the principal importers, either of British goods into France, or of French goods

goods into Great Britain. These principles, which took their rise from national prejudice and animosity, are more unreasonable than those which took their origin from private interest and a spirit of monopoly. They are so, even upon the principles of the commercial system.

First, though it were certain that in the case of a free trade between France and England, for example, the balance would be in favour of France, it would by no means follow that such a trade would be disadvantageous to England, or that the general balance of its whole trade would thereby be turned more against it. If the wines of France are better and cheaper than those of Portugal, or its linens than those of Germany, it would be more advantageous for Great Britain to purchase both the wine and the foreign linen which it had occasion for of France, than of Portugal and Germany. Though the value of the annual importations from France would thereby be greatly augmented, the value of the whole annual importations would be diminished, in proportion as the French goods of the same quality were cheaper than those of the other two countries. This would be the case, even upon the supposition that the whole French goods imported were to be consumed in Great Britain.

But, secondly, a great part of them might be re-exported to other countries, where, being sold with profit, they might bring back a return equal in value perhaps to the prime cost of the whole French goods imported. What has frequently been said of the East India trade might possibly be true of the French: that though the greater part of East India goods were bought with gold and silver, the re-exportation of part of them to other countries brought back more gold and silver to that which carried on the trade, than the prime cost of the whole amounted to. One of the most important branches of the Dutch trade, at present,  
(when



(when Dr. Smith first published his invaluable work the *Wealth of Nations*;) consists in the carriage of French goods to other European countries. Some part even of the French wine drunk in Great Britain is clandestinely imported from Holland and Zealand. If there was either a free trade between France and England, or if French goods could be imported upon paying only the same duties as those of other European nations, to be drawn back upon exportation, England might have some share of a trade which is found so advantageous to Holland.

Thirdly and lastly, there is no certain criterion by which we can determine on which side what is called the balance of trade between any two countries lies, or which of them exports to the greatest value. National prejudice and animosity, prompted always by the private interest of particular traders, are the principles which generally direct our judgment upon all questions concerning it. There are two criterions, however, which have frequently been appealed to upon such occasions. The custom-house books, it is now generally acknowledged, are a very uncertain criterion, on account of the inaccuracy of the valuation at which the greater part of goods are rated in them. The course of exchange is perhaps almost equally so.

Though by the discouragement of importation the mercantile system proposes to enrich every country, yet with regard to some particular commodities it seems to follow an opposite plan: to encourage importation. It encourages the importation of the materials of manufacture, in order that our own people may be enabled to work them up more cheaply, and thereby prevent a greater and more valuable importation of the manufactured commodities. I do not observe, adds Dr. Smith, at least in our statute book, any encouragement given to the importation of the instruments of trade. When manufactures have advanced to a certain  
pitch



pitch of greatness, the fabrication of the instruments of trade becomes itself the object of a great number of very important manufactures. To give any particular encouragement to the importation of such instruments would interfere too much with the interest of those manufactures. Such importation, therefore, instead of being encouraged, has frequently been prohibited. Thus the importation of wool-cards, except from Ireland, or when brought in as wreck or prize goods, was prohibited by the 3d Edw. IV., which prohibition was renewed by the 39th of Elizabeth, and has been continued and rendered perpetual by subsequent laws.

The importation of the materials of manufacture has sometimes been encouraged by an exemption from the duties to which other goods are subject, and sometimes by bounties.

The importation of sheep's wool from several different countries, of cotton wool from all countries, of undressed flax, of the greater part of dyeing drugs, of the greater part of undressed hides from Ireland or the British colonies, of seal skins from the British Greenland fishery, of pig and bar iron from the British colonies, as well as of several other materials of manufacture, has been encouraged by an exemption from all duties, if properly entered at the custom-house. The private interests of our merchants and manufacturers may have extorted from the legislature these exemptions, as well as the greater part of our other commercial regulations. They are, however, perfectly just and reasonable; and if, consistently with the necessities of the state, they could be extended to all the other materials of manufacture, the public would certainly be a gainer.

The encouragement given to the importation of the materials of manufacture by bounties, has been principally confined to such as were imported from our American plantations.

tations. The same commodities, however, upon which we gave bounties when imported from America, were subject to considerable duties when imported from any other country. The interest of our American colonies was regarded as the same with that of the mother country. Their wealth was considered as our wealth: whatever money was sent out to them, it was said, came all back to us by the balance of trade, and we could never become a farthing the poorer by any expense which we could lay out upon them; they were our own in every respect, and it was an expense laid out in the improvement of our own property, and for the profitable employment of our own people. It is unnecessary, I apprehend, adds Dr. Smith, at present to say any thing further to expose the folly of a system which fatal experience has now sufficiently exposed. Had our American colonies really been a part of Great Britain, those bounties might have been considered as bounties upon production, and would still have been liable to all the objections to which such bounties are liable, but to no other.

The mercantile system has not been more favourable to the revenue of the sovereign, so far at least as that revenue depends upon the duties of customs, than it has been to the revenue of the great body of the people, or to the annual produce of the land and labour of the country.

In consequence of that system, the importation of several sorts of goods has been prohibited altogether. This prohibition has in some cases entirely prevented, and in others has very much diminished, the importation of those commodities, by reducing the importers to the necessity of smuggling. It has entirely prevented the importation of foreign woollens, and it has very much diminished that of foreign silks and velvets. In both cases it has entirely

annihilated the revenue of the customs which might have been levied upon such importation.

The high duties which have been imposed upon the importation of many different sorts of foreign goods, in order to discourage their consumption in Great Britain, have in many cases served only to encourage smuggling, and in all cases have reduced the revenue of the customs below what more moderate duties would have afforded. The saying of Dr. Swift, that in the arithmetic of the customs two and two, instead of making four, make sometimes only one, holds perfectly true with regard to such heavy duties, which never could have been imposed had not the mercantile system taught us, in many cases, to employ taxation as an instrument not of revenue but of monopoly<sup>1</sup>.

High duties on importation are immoral as well as impolitic: it is unjustifiable in the legislature, first to tempt, and then to punish for yielding to the temptation.

By removing all prohibitions, and by subjecting all foreign manufactures to such moderate taxes as it was found from experience afforded upon each article the greatest revenue to the public, our own workmen might still have a considerable advantage in the home market, and many articles, some of which at present afford no revenue to government, and others a very inconsiderable one, might afford a very great one.

High taxes, sometimes by diminishing the consumption of the taxed commodities, and sometimes by encouraging

<sup>1</sup> When the value of the commodity, observes Mr. Justice Blackstone, bears little or no proportion to the quantity of the duty imposed, smuggling becomes a very lucrative employment; and its natural and most reasonable punishment, viz. confiscation of the commodity, is in such cases quite ineffectual: the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty.

smuggling, frequently afford a smaller revenue to government than what might be drawn from more moderate taxes.

When the diminution of the revenue is the effect of the diminution of consumption, there can be but one remedy, and that is the lowering of the tax.

When the diminution of the revenue is the effect of the encouragement given to smuggling, it may perhaps be remedied in two ways; either by diminishing the temptation to smuggle, or by increasing the difficulty of smuggling. The temptation to smuggle can be diminished only by the lowering of the tax; and the difficulty of smuggling can be increased only by establishing that system of administration which is most proper for preventing it.

If every duty was occasionally either heightened or lowered according as it was most likely, either the one way or the other, to afford the greatest revenue to the state; taxation being always employed as an instrument of revenue, and never of monopoly; it seems not improbable that a revenue, at least equal to the present neat revenue of the customs, might be drawn from duties upon the importation of only a few sorts of goods of the most general use and consumption; and that the duties of customs might thus be brought to the same degree of simplicity, certainty and precision, as those of excise. What the revenue at present loses, by drawbacks upon the re-exportation of foreign goods which are afterwards reloaded and consumed at home, would under this system be saved altogether. If to this saving, which would be very considerable, were added the abolition of all bounties upon the exportation of home produce in all cases in which those bounties were not in reality drawbacks of some duties of excise which had before been advanced, it cannot well be doubted but that the neat revenue of the customs might, after

an alteration of this kind, be fully equal to what it had ever been before.

If by such a change of system the public revenue suffered no loss, the trade and manufactures of the country would certainly gain a very considerable advantage. The trade in the commodities not taxed, by far the greatest number, would be perfectly free, and might be carried on to and from all parts of the world with every possible advantage. Among those commodities would be comprehended all the necessaries of life, and all the materials of manufacture. So far as the free importation of the necessaries of life reduced their average money price in the home market, it would reduce the money price of labour, but without reducing in any respect its real recompense. The value of money is in proportion to the quantity of the necessaries of life which it will purchase. That of the necessaries of life is altogether independent of the quantity of money which can be had for them. The reduction in the money price of labour would necessarily be attended with a proportionable one in that of all home manufactures, which would thereby gain some advantage in all foreign markets. The price of some manufactures would be reduced in a still greater proportion by the free importation of the raw materials. If raw silk could be imported from China and Indostan duty free, the silk manufacturers in England could greatly undersell those of France and Italy. There would be no occasion to prohibit the importation of foreign silks and velvets. The cheapness of their goods would secure to our own workmen, not only the possession of the home market, but a very great command of the foreign market. Even the trade in the commodities taxed would be carried on with much more advantage than at present. If those commodities were delivered out of the public warehouse for foreign exportation, being in this case exempted from

all



all taxes, the trade in them would be perfectly free. The carrying trade in all sorts of goods would under this system enjoy every possible advantage. If those commodities were delivered out for home consumption, the importer not being obliged to advance the tax till he had an opportunity of selling his goods, either to some dealer or to some consumer, he could always afford to sell them cheaper than if he had been obliged to advance it at the moment of importation. Under the same taxes the foreign trade of consumption, even in the taxed commodities, might in this manner be carried on with much more advantage than it can at present.

## PART IV.

## OF LAW IN GENERAL.

FROM the time that men began to form themselves into nations, there must necessarily have existed two sorts of rights and obligations for each nation. 1. The rights and obligations between the sovereign and his people, founded on fundamental laws peculiar to each state; and 2. Those rights and obligations which exist between nations, and by which they are regulated in their commerce with one another. The first is called Municipal Law; the second, International or Universal Law.

## OF INTERNATIONAL LAW.

International law, or the Law of Nations, is a system of rules deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states and the individuals belonging to each. And as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest<sup>1</sup>: but such rules

<sup>1</sup> It is not competent for one nation to add to the law of nations by its own arbitrary ordinances, without the concurrence of other nations. Per Lord Mansfield. Recognised by Lord Kenyon, 8 T. R. 437. The arbitrary ordinances of one state ought not to conclude the rights of other parties: courts of justice ought to proceed on the acknowledged law of nations, and on the existing treaties between the different states; not to deliver occasional and shifting opinions to serve the present purposes of particular national interest. Per Sir William Scott, 1 Rob. Adm. Rep. 249.

must necessarily result from those principles of natural justice in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject<sup>1</sup>.

International law divides itself into the natural or universal, and the positive or arbitrary law.

The natural law, which Cicero says is "*consensio omnium gentium*," consists, as we have just seen, of those great common principles which nature has made intrinsically binding upon all mankind alike, under whatever relation they act<sup>2</sup>. But as the simple law of nature was insufficient between nations, when they came to frequent and carry on commerce with one another, their common interest obliged them to establish conventions either express or tacit, or to regulate their intercourse with one another by simple custom. These rights and obligations, which nations have thought proper to establish among themselves, form the positive or arbitrary law.

This general positive or arbitrary law, which has been established among the nations of Europe either by treaty, convention, or by custom, is subdivided by jurists into three divisions. First, the universal or voluntary law, or those rules which common consent, either tacit or express, has established among all civilized nations, and which are founded upon natural law, or deducible from its principles. Secondly, the customary law of nations, or those maxims and customs which long usage has established among nations. This law, as it is founded upon

<sup>1</sup> 4 Blackstone's Commentaries, 66.

<sup>2</sup> Inst. lib. i. tit. 2. s. 1.

the tacit consent of the nations that observe it with respect to each other, is binding only upon those nations that have adopted it. Thirdly, the conventional law of nations, or those express treaties which from time to time have been concluded between particular countries<sup>1</sup>.

In arbitrary states international law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full force by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine causes relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, and hostages, there is no other rule of decision than this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of<sup>2</sup>.

<sup>1</sup> Vattel's Law of Nations, Prelim. s. 24, 25.

<sup>2</sup> 4 Blackstone's Commentaries, 67. 1 Ibid. 75, 273. 3 Burr. 1481.

## SECTION I.

### HOW COMMERCE IS AFFECTED BY INTERNATIONAL LAW IN TIME OF PEACE.

#### *1. Of the Right and Freedom of Commerce.*

Men being by nature obliged to assist each other reciprocally, and contribute as much as is in their power to one another's happiness, there exists a sort of general obligation, derived from the very contract on which society is formed, for them to carry on commerce with each other.

In Europe commerce is so far free, that no nation refuses positively and entirely to permit the subjects of another nation, when even there is no treaty existing between them, to trade with its possessions in or out of Europe, or to establish themselves in its territory for that purpose<sup>1</sup>.

But as this general obligation to mutual commerce depends only on an imperfect right, it does not go to hinder a nation to limit or even prohibit<sup>2</sup> her own commerce, or that of her dependencies, with foreign states, either absolutely or conditionally<sup>3</sup>. For it is a nation's right as well as duty to determine what is useful and salutary to its interests, and to affix what condition it pleases to a right it freely grants, and admit or reject any overtures of commercial intercourse with foreigners, without the least imputation of injustice<sup>4</sup>.

The mere general liberty of trade, therefore, being found-

<sup>1</sup> Marten's Law of Nations, 148, 150.

<sup>2</sup> From this right that every nation has to impose limitations, restrictions, or even prohibitions, on her own commerce, arises the right of the establishment of customs and other duties, as also of enforcing her revenue laws, and of sequestering or annulling the contracts of foreigners trading to her territories in contempt of such limitations and prohibitions. Marten, 150. Vide *Weymell v. Reed*, 5 P. R. 599.

<sup>3</sup> Marten, 148. Vattel's Law of Nations, b. i. c. 8. s. 90, 92, 94; and b. ii. c. 2. s. 24. Puff. Jus Nat. et Gent. lib. iv. s. 10.

<sup>4</sup> Vattel's Law of Nations, b. i. c. 8. s. 88—95; and b. ii. c. 2. s. 25.



ed only on imperfect rights depending on the will and judgement of another, commercial powers have been obliged to have recourse to treaties for their mutual benefit. These treaties are the measure and rule of the right of commerce, and generally turn on three points<sup>1</sup>: 1. On commerce in times of peace: 2. On the measures to be pursued with respect to commerce and commercial subjects in case of a rupture between the parties: 3. On the commerce of the contracting party that may happen to remain neuter, while the other contracting party is at war with a third power<sup>2</sup>.

Such treaties of commerce are allowable among nations, provided they do not affect the perfect rights of others, or alter the *jus gentium* with respect to the rest of the world, and may be perpetual, temporary, or dependent on certain events<sup>3</sup>.

When once a nation has entered into engagements by treaty, it is no longer at liberty to do, in favour of a third party, and contrary to the tenor of the treaty, what it might have granted agreeably to the duties of humanity, or to the general obligation of reciprocal commerce. Therefore, when a nation has engaged to another that it will sell only to them certain goods or provisions, as for instance corn, it can no longer carry such provisions to another market. The case is the same in a contract to purchase certain goods only of that nation<sup>4</sup>.

And if a nation finds its safety and advantage by entering into an engagement of trading with a particular nation, such treaty is valid. As if a state which stands in need of salt can procure a supply of it from another nation, by engaging to sell its corn and cattle only to this other nation,

<sup>1</sup> Vattel's Law of Nations, b. i. c. 8. s. 93. Puff. lib. iv. s. 10.

<sup>2</sup> Marten's Law of Nations, 154.

<sup>3</sup> Vattel's Law of Nations, b. ii. c. 2. s. 27, 29.

<sup>4</sup> Ibid. s. 30.

unquestionably such a treaty is lawful. But these kind of engagements are not to be entered into without very good reasons<sup>1</sup>.

A nation may lay a restriction on its commerce in favour of another, engage not to traffic in a certain kind of goods, forbear trading with such and such a country, &c. And in departing from such engagements it acts against the perfect rights of the nations with which it has contracted; and therefore they have a right of bringing it to reason. The natural liberty of trade is not hurt by treaties of this nature; for this liberty consists only in every nation being unmolested in the right of trading with those who consent to traffic with it; every one remaining free to close with or decline a particular commerce, as it shall judge most advantageous<sup>2</sup>.

We have seen what are the laws which nations derive from nature with regard to commerce, and by what means they may procure others by treaties: it remains to inquire whether they can found any on prescription.

Though a nation may certainly renounce the property or rights it possesses, in undertaking actions which prove such renunciation; and in thus losing its rights, it may authorize another to acquire them<sup>3</sup>; yet the abstaining from the use of a right, or keeping silence while another makes use of it, can never have the force of consent, except we are obliged to speak of, or make use of, such right. For, as long as there is no engagement, simple presumption, founded on our silence or inaction, cannot deprive us, in spite of ourselves, of our rights for the time to come. Therefore, when two nations have traded together, without interruption, for a long series of years, this long use does not give a right to either of them; and one is not obliged on this account to

<sup>1</sup> Vattel, s. 31.

<sup>2</sup> Ibid. s. 32.

<sup>3</sup> Grot. de J. B. ac P. lib. ii. c. 4. Puff. Jus Nat. et Gent. lib. iv. c. 12.

suffer the other to come and sell its merchandizes, or to buy others, if there are no treaties or agreements which require such permission : both preserve the double right of prohibiting the entrance of foreign merchandize, and of selling theirs wherever people are willing to buy it. If the English have from time immemorial been accustomed to fetch their wines from Portugal, they are not on that account obliged to continue the trade, and have not lost the liberty of purchasing their wines elsewhere. If, in the same manner, they have for a long time sold their cloth in that kingdom, they have nevertheless a right to transfer that trade to any country ; and, reciprocally, the Portuguese are not obliged by this long custom either to sell their wines to the English, or to purchase their cloths<sup>1</sup>.

What has just been said may be applied to the rights of commerce acquired by treaties. If a nation has by this method procured the liberty of selling certain merchandizes to another, it does not lose its right, though a great number of years are suffered to be passed over without its being used ; because this is a right which it is at liberty to use, or not, whenever it pleases<sup>2</sup>.

Certain circumstances, however, may render a different decision necessary, because they imply a change in the nature of the right in question. For example, if it appears evident, that the nation granting this right granted it only with a view of procuring a species of merchandize of which it was then in want ; and the nation which obtained the right of selling neglects to furnish the merchandizes agreed for ; if a third nation agrees to bring them regularly, on condition of having an exclusive privilege, it may certainly grant that exclusive privilege<sup>3</sup>.

<sup>1</sup> Marten's Law of Nations, 65, 148. Vattel's Law of Nations, b. i. c. 8. s. 95.

<sup>2</sup> Ibid. s. 96.

<sup>3</sup> Ibid. .

We now come to inquire whether a nation may appropriate a trade to itself.

If a nation alone produces certain things, another may lawfully procure itself by treaty the advantage of being the only buyer ; and then may sell them again over the whole world, provided the monopoly does not clash with the general rules of humanity. Should the nation enjoying the monopoly set an exorbitant price on its goods, this would be an offence against the law of nature, as by such an infraction it deprives other nations of a necessary or agreeable product which nature designed for all men. Yet no wrong is done, because, strictly speaking, and according to external right, the owner of a commodity may either keep, or set what price he pleases on it. Thus the Dutch, by a treaty with the king of Ceylon, engrossed the cinnamon trade into their own hands ; yet whilst they kept their profits within just limits, no nation had cause to complain<sup>1</sup>.

But did the question relate to commodities necessary to life, and the monopolizer was for raising them to an excessive price, other nations would be authorized by a regard to their own safety, and the advantage of human society, to join in bringing an avaricious oppressor to reasonable terms. The right to necessaries is very different from that of things adapted for conveniency and delight, which, if they are too highly raised, one can safely go without. But it would be absurd, that the subsistence and being of nations should depend on the caprice and avidity of one<sup>2</sup>. It is, however, only in cases of absolute necessity, that one nation can oblige another to sell to it a part of its superfluity<sup>3</sup>.

## *2. Of the Right of Passage for Merchandize.*

It may be received as a general principle, that during

<sup>1</sup> Vattel, b. ii. c. 2. s. 33.

<sup>2</sup> Ibid.

<sup>3</sup> Marten's Law of Nations, 148.

peace, every state is bound to permit a passage of her neighbours' merchandizes over her land and navigable rivers, provided no inconvenience or detriment arises to her from such freedom of passage<sup>1</sup>. For such a prohibition would be contrary to the commercial liberty generally introduced into Europe<sup>2</sup>. Besides, in the primitive communion of the earth, men had, without distinction, a right to the use of every thing necessary for the accomplishment of their natural obligations. And as nothing could deprive them of this right, the introduction of domain and property could not take place without leaving to every man the necessary use of things<sup>3</sup>. Vattel illustrates this position by the following example. The count of Lupfen having improperly stopped some merchandize in Alsace, complaints were carried to the emperor Sigismund, who was then at the council of Constance; upon which that prince assembled the electors, princes, and deputies of towns, to examine the affair. The opinion of the bourgrave of Nuremburg deserves to be mentioned. God, said he, has created heaven for himself and his saints, and has given the earth to man, in order to make it of use to the poor and the rich. The roads are for their use, and God has not subjected them to any taxes. He condemned the count of Lupfen to restore the merchandize, and to pay costs and damages, because he could not justify his seizure by any particular law. The emperor approved this opinion, and passed sentence accordingly<sup>4</sup>.

And it is from this right that all nations have a passage for their merchandize over the territories of other states, that fishermen have the liberty of drying their nets on the banks

<sup>1</sup> Vattel's Law of Nations, b. ii. c. 10. s. 130, 133, 134. Puff. lib. iii. c. 3. s. 5. Grot. Jus. B. ac P. lib. ii. c. 2. s. 13.

<sup>2</sup> Marten's Law of Nations, 168.

<sup>3</sup> Vattel's Law of Nations, b. ii. c. 10. s. 117.

<sup>4</sup> Ibid. s. 132.



of the sea, and that a vessel in distress has a right to enter, even by force, into a foreign port. But it must be observed, says Vattel, that if such vessel be infected with the plague, it may be kept at a distance by violent means<sup>1</sup>.

But as this liberty of free and unrestrained commerce is founded either on treaties, or, in demi-sovereign states, on law; in every case where it is founded only upon custom, that custom does not hinder a nation from making whatever regulations and restrictions it pleases, or from exercising over such parts of its territory all the rights of sovereign dominion<sup>2</sup>.

The permission of passage over the main seas depends on the question how far nations have a right to appropriate to themselves the property and empire of any particular seas. This right of appropriation rests on the acknowledgement and submission of their neighbours, or on an ancient exercise of executive jurisdiction, founded presumptively on an admission of prior settlement on its shores, or of subsequent cession.

Entire property is insisted on but by few nations. The question of jurisdiction has been the subject of the most earnest contention between nations. It may, however, be considered, that though the sole dominion may exist in theory, yet neither right of discovery, donation of the Pope, nor prescription, will exclude other nations from a free possession<sup>3</sup>. No nation can appropriate to itself dominion over the neighbouring seas further than is necessary for its safety, or for rendering itself respected: it would be a vain and ridiculous pretension to claim a right which it was no ways able to cause to be respected<sup>4</sup>. After the vain pre-

<sup>1</sup> Vattel, b. ii. c. 10. s. 123, 129; and b. i. c. 23. s. 288; and see Puff. Jus Nat. et Gent. lib. iii. c. 3. s. 8.

<sup>2</sup> Marten's Law of Nations, 168.

<sup>3</sup> Vattel, b. i. c. 23. s. 281. Grot. Mare Liberum, Lugd. Bat. 1609. Seld. Mare Clausum, lib. i. c. 17.

<sup>4</sup> Vattel, b. i. c. 23. s. 289.

tensions and contestations of the Portuguese to the sovereignty of the Guinea and Indian seas during the sixteenth and seventeenth centuries, all the powers of Europe now acknowledge the ocean and the Indian Sea to be exempt from all property and dominion, and to be the common possession of all nations <sup>1</sup>.

A nation may, however, renounce by treaty the liberty of navigating any particular sea. Thus the house of Austria renounced in favour of England and Holland the right of sending vessels from the Netherlands to the East Indies. We may see in *Grot. de Jure B. ac P. lib. ii. c. 3. s. 15.* many examples of such treaties among the ancients; and in Bouchaud, p. 202, among the moderns <sup>2</sup>.

But no nation can acquire an exclusive right of navigation by prescription and long use. For, as we have already seen that the abstaining from the use of a right, or keeping silence while another makes use of it, can never have the force of consent, except we are obliged to speak or make use of such right; consequently the immemorial possession of a navigation or fishery in certain seas will give not an exclusive right to the nation possessing it; unless there appears an evident intention of the party claiming the common right to navigation and fishery in those seas to renounce such their common right <sup>3</sup>.

The intention of a renunciation to a common right of navigation and fishery may, however, be inferred from a neglect of use attended with the nature of a consent, or a tacit pact; and thus become a title in favour of one nation against another. Thus, when a nation in the possession of the navigation and fishery in certain latitudes pretends an exclusive right, and forbids any other interfering in it; if these obey that prohibition with sufficient marks of acquiescence, they tacitly

<sup>1</sup> Vattel, b. i. c. 23. s. 284. Marten, 166.

<sup>2</sup> Vattel, b. i. c. 23. s. 284.

<sup>3</sup> Ibid. s. 285.

renounce their right in favour of the other, and establish a right which the other may afterwards lawfully maintain against them, especially when it is confirmed by long use<sup>1</sup>.

But notwithstanding the ocean and the four great seas that compose it are acknowledged to be the common possession of all nations<sup>2</sup>, there are out of Europe some inconsiderable parts of the ocean claimed as the property and dominion of particular European nations<sup>3</sup>. And in general it is held, that the sea surrounding the coast, as well those parts of it that are land-locked, such as roads, bays, gulfs, &c., as those which are situated within cannon shot of the shore, (that is, within the distance of three leagues,) are so entirely the property, and subject to the dominion, of the master of the coast, that, first, he has the exclusive right to all the property of it, whether ordinary or accidental, as far as relates to things unclaimed by any other lawful proprietor. Secondly, he can forbid or restrain the navigation of foreigners in his roads, and their entry into his ports. Yet in time of peace this liberty is permitted to merchant ships, and even to ships of war to a certain number. Thirdly, he has a right to impose duties, tonnage, &c. fees of entry, of clearance, &c. and he can institute tolls for the benefit of his navigation. Fourthly, he may require the maritime honours that custom allows to those who have dominion over any part of the seas. In short, those parts of the sea which surround the coast of every state are so completely susceptible of property, that they are comprehended in its territory, and no one can navigate them in spite of the proprietary nation<sup>4</sup>.

The rights exercised on the sea near the coast are also

<sup>1</sup> Vattel, b. i. c. 23. s. 286.

<sup>2</sup> Puff. De Jure Nat. et Gent. lib. iv. c. 5.

<sup>3</sup> Moser, Nordamerica, vol. iii.

<sup>4</sup> Marten, 168. Vattel, b. i. c. 22. s. 274; c. 23. s. 287, 288, 291.

exercised in those straits which are not wider than the range of two common shots. It is for this reason that the king of Denmark, by possessing the property and dominion of the navigable part of the Sound, claims there not only the maritime honours due to him as sovereign, but tolls for the liberty of passing, and for defraying the expense he is at in maintaining light-houses, sea-marks, and other things necessary for the safety of mariners. But it must be remarked, that in such straits (as for example the Straits of Magellan) over which empire cannot extend, and still less a right of property, the freedom of navigation is a remainder of the primitive liberty enjoyed in common by mankind<sup>1</sup>.

What has been said of straits which are too extensive for the claim of empire and the right of property, may be understood of such bays as are too extensive for a like claim; as Hudson's Bay<sup>2</sup>.

After the discussion of the question of the right of dominion and property in respect to the sea, it remains to mention what parts of the sea are acknowledged as free or subject.

The three straits between Denmark and Sweden are under the dominion, and are considered as the property, of the king of Denmark; who also claims a right of excluding foreigners from fishing and even navigating the seas adjacent to Iceland and Greenland, to the space of four miles from Iceland, and fifteen miles from Greenland. But the right of fishing has been disputed by many nations, particularly by the United Provinces.

2. The Straits of Sicily are under the dominion of the king of Sicily.

3. The Gulf of Bothnia is under the dominion of the king of Sweden.

<sup>1</sup> Marten, 171. Vattel, b. i. c. 23. s. 291, 292.

<sup>2</sup> Ibid. s. 291.

4. The Turkish Emperor claims the dominion over the Black Sea, the Egean Sea, the Bosphorus of Thrace, the Propontis, and the Hellespont. Over the Black Sea he exercises his right of proprietor and sovereign in such a manner as not to permit even the entry or navigation of it to any nation whatever, unless he has granted it by treaty.

5. Great Britain.

The extent of the maritime dominion of England seems to consist of two parts, the profitable and the honorary. The profitable regards our own coasts only, to a certain distance from the shore, in the sight whereof foreigners were not usually suffered to fish. The honorary is that of respect to the British flag, which we claim from all nations, and still support.

The boundaries we have established for this purpose are the British Channel on the south, extending to the shores of France, and to those of Spain as far as Cape Finisterre; from thence, by an imaginary line west, twenty-three degrees of longitude from London to the latitude of sixty degrees north, which last is called the Western Ocean of Britain; from thence, by another imaginary line in that parallel of latitude, to the middle point of the land Van Staten on the coast of Norway, which is the northern boundary; and from that point it extends along the shores of Norway, Denmark, Germany, and the Netherlands, to the British Channel again; which last boundary comprehends what is called the Eastern Ocean of Britain. These are the original limits acquired at the time of king Alfred's beating the Danes out of these seas; and from thenceforth the kings of England took on themselves the more peculiar guard and sovereignty of the seas, protecting the traders of all nations from the insults of pirates; and to answer the expense of keeping fleets at these seas, and for protection, all nations who sailed into these seas paid a tribute in pro-



portion to the burden of their ships; but this tribute is now confined to the ceremony of lowering the flag<sup>1</sup>.

6. The claim of the Republic of Venice to the dominion over the Adriatic Sea, and of Genoa over the Ligustic Sea, was always disputed by other nations; and as these pretended empires are respected only while the nation that lays claim to them is able to support them by force, they consequently fall with its power<sup>2</sup>.

7. After many disputes with respect to the dominion of the Baltic, and particularly with respect to the honours of the flag, some of the states situated on its shores have agreed to yield those honours in certain districts, and to omit them reciprocally in others<sup>3</sup>.

8. The following seas are acknowledged free: the Spanish Sea, the Aquitain Sea, the North Sea, the White Sea, the Mediterranean Sea, and the Straits of Gibraltar<sup>4</sup>.

One of the consequences arising from the claim of dominion and property in particular parts of the sea, is the right of receiving and paying maritime honours, or the obligation for vessels to salute one another. Even on those parts of the sea which are acknowledged to be free or neutral, the obligation of salute seems to be required from merchantmen. The usual method of salute used by merchant vessels is by lowering or hauling down the foretop-sail. Merchant ships, even when they are armed, are obliged to salute all vessels of war, fortresses and ports, as well with their cannon, as with their merchant flags and their sails<sup>5</sup>.

The right of claiming tolls, or passage duties, for goods carried across the territory, either by land or water, from one foreign country to another, has been so firmly esta-

<sup>1</sup> Godolphin *Adm. Juris*. Selden's *Mare Clausum*.

<sup>2</sup> Marten's *Law of Nations*, 164, 172. Vattel, *h. l. c.* 23. s. 289.

<sup>3</sup> Marten's *Law of Nations*, 173.

<sup>4</sup> *Ibid.* 164.

<sup>5</sup> *Ibid.* 174, 177.

blished by custom or treaty, that it is now no longer disputed. Its origin may be traced to the remotest antiquity<sup>1</sup>. Both Grotius<sup>2</sup> and Puffendorf<sup>3</sup> give it the sanction of their authority.

These tolls or passage duties, which in some countries are called transit duties, are levied for the maintenance of the roads and navigation, and are justly imposed upon all those who receive advantage from their use. The most important transit duty in the world is that levied by the king of Denmark upon all merchant ships that pass through the Sound<sup>4</sup>.

But when the transit duty is excessive, and bears no proportion to the expense of preserving these public passages; or when it is levied for the preservation or construction of roads, or the convenience of navigation, where the master of the soil or the shore is at no expense for the same, such imposts are contrary to the law of nations<sup>5</sup>.

It is necessary to mention the right to shipwrecks, the unhappy fruits of barbarism, and which almost every where disappeared with it. This pretended strandright, which is consonant neither to reason nor humanity, has been restrained from time to time, particularly since the thirteenth century, by privileges, laws, and a number of treaties; so that, at present, it may be considered as generally abolished<sup>6</sup>. The humane expostulation of Constantine the Great on this subject deserves to be recorded. That prince, finding that by the Imperial law the revenue of wrecks was given to the royal treasury or *fiscus*, restrained it by an edict<sup>7</sup>, and

<sup>1</sup> Plin. Hist. Nat. xii. 14.

<sup>2</sup> De Jure B. ac P. lib. ii. c. 2. s. 14.

<sup>3</sup> De Jure Nat. et Gent. lib. iii. c. 3. s. 7.

<sup>4</sup> Vattel, b. i. c. 9. s. 103. 3 Smith's Wealth of Nations, 390.

<sup>5</sup> Vattel, b. i. c. 9. s. 104.

<sup>6</sup> Schuback, Diss. de Jure Littoris, Got. 1750. Commentarius de Jure Littoris, vol. i.

<sup>7</sup> Cod. 11. 5. 1.

ordered them to remain to the owners, adding, “*Quod enim jus habet in aliena calamitate, ut de re tam luctuosa compendium sectetur.*”

But though the rigour of the law of wrecks has been softened in favour of the distressed proprietors, and that justice and humanity have forbid adding sorrow to sorrow ; yet the master of the shore has a right to a compensation for the expenses he may incur in preserving property wrecked on his coasts, and assisting vessels in danger, and even to detain a part of the property by way of indemnification. This right (*jus colligendi naufragium*) is every where exercised, now-a-days, before restitution is made, even to those who appear in the appointed time. The time allowed for claiming ship-property is generally a year, counting from the day on which the proprietor is informed of the accident ; and if no proprietor appears, the effects saved from the wreck belong either to the first possessor, or to the sovereign of the shore if the law gives him a right to them<sup>1</sup>.

## SECTION II.

### HOW COMMERCE IS AFFECTED BY INTERNATIONAL LAW IN TIME OF WAR.

#### *As between Belligerent and Belligerent.*

We have already said that, generally speaking, the commerce of Europe is so far free, that no nation refuses positively and entirely to permit the subjects of another nation, when even there is no treaty existing between them, to trade with its possessions in or out of Europe, or to establish themselves in its territory for that purpose. But a state of war forms an exception. A declaration of hostility naturally carries with it an interdiction of all commercial

<sup>1</sup> Marten, 170. Vattel, b. i. c. 23. s. 293.

intercourse; it leaves the belligerent countries in a state that is inconsistent with commerce. In the state of warfare, all treaties, civil contracts, and rights of property, are put an end to; and therefore trading, which supposes the existence of civil contracts and relations, is necessarily contradictory to a state of war.

From the moment a sovereign is in a state of war, he has a right, strictly speaking, to act as an enemy, not only with respect to the persons and property found in the territory of the enemy, but also with respect to the enemy's subjects and their property which may happen to be situated in his own territory at the breaking out of the war<sup>1</sup>. He has a right, then, to seize on their ships found in his ports, and on all their other property; to arrest their persons, and to declare null and void all the debts which the state may have contracted with them<sup>2</sup>.

However, nations, for their mutual benefit, have been induced to temper the rigour of this right. 1. In a great number of treaties, nations have stipulated, in case of a rupture between them, to give each others subjects residing in their territory at the breaking out of the war, or coming to it not knowing of the declaration of war, a specified time for the removal of themselves and their property. And if they are detained by sickness or any other impediment, a further time is to be given them. 2. Sometimes it is agreed to let the subjects of an enemy remain during the whole course of the war, or so long as they live peaceably and quietly. 3. Besides these precautions taken between nation and nation, many states have provided, by particular laws and privileges, for the protection of the persons and property of enemies' subjects. 4. Generally speaking,

<sup>1</sup> Marten's Law of Nations, 282.

<sup>2</sup> Grot. lib. iii. c. 9. s. 4. Puff. lib. viii. c. 6. s. 19, 20. Wolf Jus Gent. s. 1184, 1198.

a nation does not venture to touch the capitals which the subjects of the enemy may have in its funds, or that it may otherwise owe to such subjects<sup>1</sup>.

Where there are neither treaties nor laws touching these points, nations continue still to seize on all the property belonging to its enemy's subjects which is carried into its territories after the declaration of war<sup>2</sup>.

Every sovereign engaged in war may prohibit all commerce whatever with the enemy : first, in his own territory and maritime dominion ; secondly, in the places, provinces, &c. taken from the enemy ; thirdly, in such places as he is able to keep blocked up so as to prevent every foreigner from entering. In all these cases he may attach penalties to the transgression of his prohibitions ; and these penalties may extend to the confiscation of goods and vessel, or to the corporal punishment of those who assist in the carrying on of such prohibited commerce<sup>3</sup>.

This principle of restraining the subjects of one belligerent nation from all commercial intercourse with the subjects of the other, is not peculiar to the law of any country ; it is laid down by Bynkershoek, with whom almost all the elementary writers on the law of nations concur, as an universal principle of law. "*Ex naturâ belli commercia inter hostes cessare non dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, &c.*"<sup>4</sup> To this authority Beerius, in his decisions, lends his sanction. In opposition to some distinctions and qualifications which had been suggested by particular lawyers, he maintains, "*Ego tamen contrarium credo,*

<sup>1</sup> Marten's Law of Nations, 283. Vattel, b. iii. c. 4. s. 63. Emerignon, vol. i. p. 567.

<sup>2</sup> Marten's Law of Nations, 283.

<sup>3</sup> Ibid. 319.

<sup>4</sup> Quest. Jur. Pub. lib. i. c. 3.



quod non licet tam *licitas* quam *illicitas* hostibus deferre, tempore guerræ ;” and he declares this to be the general opinion of jurists.

It is illegal for a subject in time of war, without the king’s license, to bring goods even in a neutral ship from an enemy’s port, which after the commencement of hostilities had been purchased by his agent resident in the enemy’s country, although it may not appear that they were purchased of an enemy <sup>1</sup>.

So in a conjoint war, that is, where two nations are in alliance against a common enemy, no subject of one belligerent can trade with the enemy, without being liable to forfeit his property engaged in such trade, in the prize courts of his ally <sup>2</sup>.

In a conjoint war, when an ally in the war is permitted to trade with the enemy in “innocent articles,” such permission will not extend to naval and military stores. But the infection of such contraband commodities will not cause the condemnation of the innocent parts of the cargo, if, by order of the confederated government, all other goods are directed to be restored <sup>3</sup>.

In the course of the judgement in this case Sir William Scott said, I am of opinion, that where such articles occur, though the word *contraband* may be kept out of sight, the court is bound to consider them *as of the nature of contraband*, in such a sense as renders it impossible that they should be included under the description of innocent articles. When allied nations are pursuing a common cause against a common enemy, it must be taken as an implied, if not an express contract, that one state shall not do any thing to defeat the general object. If one state admits its

<sup>1</sup> Potts v. Bell, in Error, 8 T. R. 548.

<sup>2</sup> The *Nayade*, 4 Rob. Adm. Rep. 251.

<sup>3</sup> The *Neptunus*, 6 Ibid. 403.

subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that aid and comfort to the enemy which may be very injurious to the prosecution of the common cause, and to the interests of its ally. It should seem, that it is not enough, therefore, that *one* has allowed this practice to its own subjects ; it should appear to be, at least it is desirable that it could be shown, that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state.

This is the general principle, continues the same enlightened judge, that I feel myself bound to apply to the whole class. And in no instance can the penalty of confiscation be applied with more propriety than in this case, in which the parties exporting these articles to the enemy are British subjects domiciled in Sweden. It has been decided both in this court and in the Court of Appeal, that though a British subject, resident abroad, may engage in trade generally with the enemy, he cannot carry on such a trade in articles of a contraband nature. The duties of allegiance travel with him, so as to restrain him from supplying articles of that kind to the enemy.

Trading with an enemy on an adventure originating before the war, and before the parties could have any knowledge of that event, but not stopped on notice of hostilities having been commenced, will not subject the cargo to condemnation, if the place of their ulterior destination had become a British settlement before the arrival of the ship. For if the intent was to trade with an enemy (which cannot be ascribed to the party at the commencement of the voyage, when hostilities had not been declared), but at the time of carrying the design into effect the person has not become an enemy; the intention here wants the *corpus delicti*. On the contrary, where a country is known to be  
hostile,

hostile, the commencement of a voyage towards that country may be deemed a sufficient act of illegality ; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect <sup>1</sup>.

But if the place of destination had remained hostile, the party, after knowledge of hostilities, must exonerate himself from the intention of trading with an enemy before he can have restitution of his property from the captors <sup>2</sup>.

Goods for which orders had been given before the commencement of hostilities will be restored to the owners, if it appears that there was no possibility of countermanding the order. For though the demand against the merchant would be suspended during hostilities, it might be difficult to relieve the British merchant from the demand when his foreign correspondent was rehabilitated and restored to his right of action by the return of peace <sup>3</sup>.

If British subjects, who had been settled in trade in foreign states in time of amity, make arrangements for their removal, but are prevented from doing so by the detention of the hostile state, they will be entitled to restitution of their property from the captors <sup>4</sup>.

The situation, says Dr. Robinson, of British subjects wishing to remove from the country of the enemy in the event of a war, but prevented by the sudden interruption of hostilities from taking measures for that purpose sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Court. In such cases it would be advisable for persons so situated, on their actual removal, to make application to government for a special pass, rather than to hazard valuable property to the effect of a mere previous intention to

<sup>1</sup> The Abby, 5 Rob. Adm. Rep. 251.

<sup>3</sup> The Juffrow Catharina, 5 Ibid. 141.

<sup>4</sup> The Ocean, 5 Ibid. 91.

<sup>2</sup> Ibid.

remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution<sup>1</sup>.

It is a decided point, that even an inactive and dormant partner cannot receive restitution in a transaction in which he could not lawfully be engaged as a sole trader. Therefore, if a British merchant is jointly interested with a merchant in America in a shipment from America to a country in a state of hostility with Great Britain, his share of the cargo will be condemned, as the property of a British merchant engaged in commerce with the enemy. But the share of the cargo belonging to the neutral partner is held to be inviolable<sup>2</sup>.

It remains to inquire how a natural-born subject may divest himself of his national character by residence in a hostile territory.

In Europe and the western parts of the world, by the law of nations, traders take their national character from the general character of the country in which they are resident, unless they trade under some recognised authority of their own country: they are considered subject to the same obligations, bound by the same duties, and amenable to the same common authority of tribunals as the natives of the state in which they reside. Therefore a British subject, by settling in trade in an enemy's colony, exposes his property taken on a voyage from such colony to Europe to confiscation; unless some overt act or solid fact affords evidence of the party's intention to withdraw from such hostile territory<sup>3</sup>.

In the East, however, from the oldest times an immiscible character having been kept up, foreigners are not admitted into the general body and mass of the society; they

<sup>1</sup> Rob. Adm. Rep. note (a.)    <sup>2</sup> *The Franklin*, 6 Rob. Adm. Rep. 127.

<sup>3</sup> *The President*, 5 Rob. Adm. Rep. 277.

do not acquire any national character under the general sovereignty of the country ; neither are they known in their own peculiar national character ; but are considered to take their national character from that association or factory under whose shelter and protection they live and carry on their commerce. And therefore the property of a foreign merchant, who lives under a British administration in India, and has the benefit of its protection for his person and commerce, is liable to confiscation, if taken in trade with an enemy<sup>1</sup>.

But the character which is gained by residence ceases by residence : it is an adventitious character, which no longer adheres to the person from the moment that he puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*. Therefore a ship captured on its voyage from Batavia to Hamburgh, and belonging to a native American who had settled in England as a British merchant, but was actually preparing to return to his own country, was decreed to be restored ; for, the moment a person is on his way to his own country, his native character is strongly and substantially revived<sup>2</sup>.

So in the case of the *Snelle Zeylder*<sup>3</sup> ; Mr. Curtissos, who was a British-born subject, had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country, to take up his final residence ; but he had got no further than Holland, (whether he had gone for the purpose of settling some accounts,) the mother country of those settlements, when the war broke out. It was determined by the Lords of Appeal, that he was *in itinere*, that he had put himself in motion, and was in pursuit of his native British character : and as such he was held to be entitled to the restitution of his property.

<sup>1</sup> The Indian Chief, 3 Rob. Adm. Rep. 22.

<sup>2</sup> The Indian Chief, 5 *ibid.* 12.

<sup>3</sup> Lords, April 25, 1783.



But whether the claimants had taken measures to withdraw, and had actually engaged in the operation of removing, may be relieved by the circumstances of the settlements having been in British possession at the time of commencing their residence, taken in conjunction with the presumption raised by the stipulation of a treaty, that persons so settled would remove in three years, on the restitution of the settlement <sup>1</sup>.

Though restitution will be decreed when a neutral or natural born subject has gone into an enemy's country for the purpose of withdrawing his property, and invested the same in a shipment to his own country; yet it is otherwise if such investment is made with a view to mercantile speculations with other countries <sup>2</sup>.

If a house of trade in a neutral country sends a partner into a belligerent country, with an intention of not mixing in any other trade than the business of that house; if the purpose be of such a nature as may probably, or does actually, detain the person for a great length of time in the hostile territory, such a circumstance will impress a national character upon him <sup>3</sup>.

A merchant of Embden, having also a share in a house in London, is not precluded by that circumstance from averring an entire interest in his house at Embden, in a shipment from the enemy's country consigned to the house in London <sup>4</sup>.

In the case of the *Phoenix* <sup>5</sup>, Sir William Scott said, Certainly nothing can be more decided and fixed, as the principle of this court, and of the Supreme Court, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of the soil is concerned, in its transportation to any other country,

<sup>1</sup> *The Diana*, 5 Rob. Adm. Rep. 60.

<sup>2</sup> *The Dree Gebroeders*, 4 Ibid. 232.

<sup>4</sup> *The Herman*, 4 Ibid. 228.

<sup>3</sup> *The Harmony*, 2 Ibid. 322.

<sup>5</sup> 5 Ibid. 20.

whatever the local residence of the owner may be. On this principle, the property of the claimants taken in a voyage from Surinam to Holland, and described to be the produce of their estates in Surinam, was condemned as legal prize to the captors, though such claimants were properly domiciled in neutral territories: for it is an established principle of the Prize Courts, that such property is to be considered under the national character of the parent state.

A natural born subject of this country admitted citizen of the United States of America, either before or after the declaration of American independence, may be considered as a subject of the United States so as to entitle him to trade to the East Indies under the treaty of commerce confirmed by the statute 37 Geo. III. c. 97.<sup>1</sup>

Property sent from a hostile territory cannot change its character in transitu, although the owners become British by capitulation before the capture<sup>2</sup>.

A contract entered into between a British subject and the government of the belligerent country, being illegal in the hands of such British subject, is illegal also in the hands of persons employed to execute it for him<sup>3</sup>. The circumstances of the case were, that a contract was entered into between Mr. Robinson, a British subject, resident at Curacao, which had fallen under the British government when the contract was carried into execution, and the Spanish government of the Caraccas, giving a monopoly of the tobacco produced in those settlements for three years; and that Mr. Robinson had entered into a sub-contract with Messrs. Sontag and Co. of Hamburg to execute this contract. It was contended on the part of the captors, that the contract, being illegal in the hands of Mr. Robinson, must be held to be illegal in the hands of Messrs.

<sup>1</sup> *Marryat v. Wilson*, in Error, 1 Bos. and Pul. 430.

<sup>2</sup> *The Dankebaar African*, 1 Rob. Adm. Rep. 107.

<sup>3</sup> *The Anna Catharina*, 4 Ibid. 107.

Sontag and Co. who were employed to execute it under a contract with him ; and that the interest of Robinson was not even divested, since it appeared that his house at Curacao was to have one-third of the profits. It was further contended that the cargo was to be considered as going to become the property of the Spanish government on arrival, and therefore to be deemed Spanish property : that the nature of the contract with the Spanish government, giving a monopoly of the tobacco of those settlements for three years, would also have the effect of impressing on the property passing under the contract, and the persons carrying it into execution, the Spanish character.

On the nature of this contract, said Sir W. Scott, two questions arise : first, How is the property to be *legally* considered ? If the cargo is to be taken as being actually become Spanish property, there will be an end of the case, under the rule which renders goods going to a belligerent, to become his property immediately on arrival, subject to confiscation. This is a rule universally applied by this court, and confirmed by the authority of the Supreme Court. A distinction has indeed been admitted in favour of contracts made before a war, and without any consideration of war ; but if the contract being made before the war, and without any prospect thereto, is carried into execution by a shipment after the breaking out of hostilities, the ground on which that favourable distinction is made no longer exists. The original contract in this case was originally inoffensive, both parties being enemies. But on the principle before adverted to, if a party becomes a neutral after the contract, and before the execution of it, and shipment takes place afterwards, *that* also will compose a case not falling within the reach of the relaxation. By the cession of Curacao, Mr. Robinson became not merely a neutral, but a subject of this country ; and then his contract

tract becoming illegal, ought to have terminated; for, by the change in his civil relations, his legal capacity to execute such a contract was totally extinguished. He, however, is not the person for whom the present cargo is claimed. The goods were not shipped by him, though he was in Europe at Hamburgh, at the time, for the purpose of carrying the contract into execution. The shipment was made by Mr. Sontag, and other merchants of Hamburgh, to whom a part of his contract had been transferred by Robinson. It has been argued, that the contract becoming illegal in the hands of Robinson, the illegality would travel over with it, and attach on those persons carrying it into execution. I am not disposed to hold that *it would affect them*, as a contract made or executed *in breach of allegiance*. The immediate shippers are neutral persons, Messrs. Sontag and Co. of Hamburgh, acting under the contract, as it was devolved on them, to supply the goods, and receive the return cargoes, in the same manner as Robinson was to have done. No duties of allegiance bound them to abstain from a direct commerce with the enemy of this country; and it cannot be inferred that any violation of duties of that species, on his part, could at all be transferred to them, who are neutral merchants, standing indifferent to both parties. But taking them to be such, how does the character of the goods stand in this transaction? Was it not, in the first place, a cargo going to become the property of the Spanish government immediately on arrival? Was not the Spanish government entitled to possession? It was only on the violation of the contract on the part of the Spanish government that these goods were to take the chance of the market. The shippers considered themselves as bound to deliver them for the use of the Spanish government, under the agreement; as entitled to the benefit, and subject to the obligations of that contract.

Were there any immediate acts to be done after the arrival of the vessel? Is there any act of ownership which the claimant was at liberty to exercise, so as to prevent the delivery? If not, the goods must be considered as having substantially become, in itinere, the property of the enemy.

But there is a second question—Whether such a contract does not fix on Robinson the character of a Spanish merchant, and, by conferring that character on him, confer it also on those who adopted the contract under him? What is the effect of the contract? It is to give a privileged monopoly of the tobacco trade of those settlements for three years; and that privilege guarded by other privileges of a higher nature. These goods were to be imported, and other goods exported, duty free. They were to be sold to the Spanish government, and for the use of the Spanish settlement. This gives at least the full benefit of the Spanish character. It may possibly go further, since there is no reason to suppose that a Spanish merchant, merely as a subject of Spain, would have been admitted to such privileges in the ordinary course of his private trade. Can such a communication of peculiar indulgence, which elevates Mr. Robinson above the private Spanish merchant, be considered, then, as less than a communication to these individuals of the entire benefit of a Spanish character, as far as this transaction is concerned? In such a state, what is there wanting to constitute the absolute Spanish character?—Nothing, but actual bodily domicile. The parties can hardly be said even to want *that*, because they have a stationed resident agent in the Spanish settlement, for the very purpose of conducting this permanent commercial undertaking. It is not, indeed, held in general cases, that a neutral merchant, trading in the ordinary manner to the country of a belligerent, does contract the character of a person domiciled there, by the mere residence of a stationed agent; because,

in



in general cases, the effect of such a residence is counter-acted by the nature of the trade, and the neutral character of the merchant himself. But it may be very different, where the principal is not trading on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy. There the nature of his trade does not protect him. On the contrary, the trade itself is the privileged trade of the enemy, putting him on the same footing as their own subjects, and even above it. This circumstance operates, if I may so express it, in such a case, to fill up the totality of all that is required to constitute a Spanish character. This is the state in which Mr. Robinson would have stood under the contract.

Then how does it affect Mr. Sontag, who is engaged in carrying it into execution? The legal consequence will be, to clothe him who accepts the contract, with the same character, so far as this transaction extends. It is by nothing peculiar in his own character, that Mr. Robinson would be liable to be considered as a Spanish merchant, but merely by the acceptance of this contract, and by acting upon it. If other persons take their share, and take those benefits, they take their share also in the legal effects. They accepted his privileges; they adopted his resident agent: it would be monstrous to say, that the effect of the original contract is, to give the Spanish character to the contracting person, but that *he* may dole it out to an hundred other persons, who, in their respective portions, are to have the entire benefit, but are not to be liable to the effect of any such imputations. The consequence would be, that such a contract would be protected in the only mode in which it could be carried into effect; for a contract of such extent must be distributed; and if every subordinate person is protected, then here is a contract which concludes the original undertaker of the whole,

but in no degree affects one of those persons who carry that whole into execution.

On these grounds, I am of opinion that these goods are liable to be considered as the property of the Spanish government; and further, that these parties are liable to be considered as persons clothed, in this transaction, with the character of Spanish merchants.

But in the case of the *Vrow Anna Catharina*<sup>1</sup>, where neutral merchants claimed, under a sub-contract with Voute and Co. of Amsterdam, considerable parcels of Batavian produce purchased of the Dutch East India Company, to be brought to Amsterdam, and there sold by the East India Company, restitution of the property captured on a voyage to Holland was ordered.

Sir William Scott in giving judgement said, Several circumstances approximate this to a Dutch transaction; for, unquestionably, there is a great deal of Dutch agency and even of Dutch interest throughout: But is it so essentially Dutch, that a foreign character cannot be predicated of it? What are the circumstances to which such an effect can be attributed? Certainly not the mere purchasing of goods at Batavia out of the Company's stores; for that we have seen done in a variety of cases, without necessarily affecting the character of the foreign purchaser. That this is done by a contract with the Company in Europe, will not invalidate. That the contract engages, that the purchased articles shall come to Europe in Dutch vessels, will not invalidate. But this case turns upon two questions of law. The general fact out of which these questions arise, is a contract of sale from the Dutch Asiatic Company of a quantity of goods laying at Batavia to certain persons in Holland, who have contracted to undersell to certain other persons resident in foreign countries, who are the claimants

<sup>1</sup> 5 Rob. Adm. Rep. 161.

and asserted proprietors. To entitle them to receive restitution, it must appear that they are proprietors; and secondly, that they are *qualified proprietors*; that is, that they are persons who are not disabled, by any circumstances belonging to this transaction, from receiving restitution of their property in this court. These are the two questions. In order to determine upon them, the nature of the original contract, between the Dutch Asiatic Company and the first purchasers, must be first considered. That contract appears to have been entered into on the 21th of March, 1802, between Voute and Co. acting for themselves and divers other merchants of the commercial cities of Holland. These parties are considered as actual proprietors, and are so described throughout. Under this contract "they are to provide ships, and to send them to Batavia. They are there to receive the goods, and to pay the price—one-third in Europe, one-third on delivery at Batavia, and the remaining third on the return to Holland, where the goods were to be deposited in the warehouses of the Company, and sold by the Company under the usual conditions of their sales." The first question that has been raised, is, Whether these persons are to be considered as proprietors? But on what ground is it asserted that they are not? Is it to be objected, that they had not paid the whole purchase money? That is an objection which every day's habits of considering such subjects will not support; two-thirds had actually been paid, and the remaining third was to be received, according to the contract, on the arrival of the goods in Europe: that is a sufficient legal payment. It is next contended that there was no delivery! How does that stand in point of fact? The goods had actually been delivered to their agents, and were coming *for their account and risk*. It is true that they are, by the contract, to be delivered to the Asiatic Company; but upon what authority?

rity? By the contract of the party that it shall be so. In what capacity are the Company to act in their sales? In the capacity of agents. It is not a delivery to the Company, that the Company may do what they please with the goods. They are bound to sell them upon the terms prescribed, and to pay over the proceeds. Does this deprive the owner of the dominion over his goods, so as to destroy his right of property? If I, having goods, hand them over to another to sell, the circumstance of the man's having been the original proprietor of the goods would make no difference. He had conveyed his right of property, and it would be no derogation of those rights, that by the terms of the purchase he was to have the management of the sale. There would be no foundation for the assertion that the goods were not completely delivered, merely because they reverted to their former proprietor in a new character. His possession, as agent, is my possession. In the present case, it is hardly necessary to observe, that at the time of the capture the goods were in the possession of the purchasers; they had not yet reverted. The obligation to revert, founded on a mere voluntary compact, would not defeat the immediate possession, if personal possession could be held sufficient to support the right of property: but it is by no means necessary. Suppose the case of the East India Company holding a delegated and confided possession of goods in this country, for the purpose of bringing them to their regular sales; could it be said of such goods, that the contract under which they have been acquired by the proprietor, subject to this condition, was a contract for the profits only, and not for the goods themselves? Is it necessary that there should be a manual possession by the hands of the purchaser himself? Is there not a legal delivery, an implied delivery, a presumed delivery through the hands of the agent? This is the ordinary mode

mode of effecting the *traditio* ; and whether it is given to the same person accepting the office of agent, or to a third person accepting it, still it does not interfere with the *emptio* and *venditio*. In these first purchasers, then, there was a clear right of property ; and if they, not being restricted from conveying it by contract, transfer it to others capable of receiving it, it will equally be property in them : for what more stands in the way of *their* rights of property ? If Voute had all the rights of property, and the want of payment, and the want of delivery, is no objection against *him*, neither will it be an objection against *them*, if he has transferred to them all these rights, having a legal faculty so to do.

Contracts of purchase effected on the part of the belligerent, but left executory as to payment, and contingent on a delivery at an ulterior port, at the risk of a neutral merchant, are not allowed in time of war : and goods sailing under such a contract, and taken in transitu, have been considered the absolute property of the enemy<sup>1</sup>.

Hostilities, besides incurring a confiscation, occasion a suspension of all legal remedies, a total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other ; for during warfare all communication is fundamentally inconsistent with the relation at that time existing between the belligerent nations. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. No man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy ; such as his coming under a flag of truce, a cartel, a pass, or some other act of public autho-

<sup>1</sup> The Atlas, 2 Rob. Adm. Rep. 309.



urity that puts him in the king's peace *pro hac vice*: but otherwise he is totally *exlex*!<sup>1</sup>

*As between Belligerents and Neutrals.*

All writers admit that neutrals have a right to trade with either belligerent nation in the way they consider most advantageous. The right which a nation enjoys, in time of peace, of selling and carrying all sorts of merchandize to every nation which chooses to trade with it, it enjoys also in time of war, provided that it remains neuter. It follows, then, that a neutral nation may permit its subjects to carry all sorts of merchandize, including arms and ammunition, to the powers at war, or to that of them with which this commerce may be carried on to the greatest advantage. So long as the state, that is the sovereign power, in a neutral nation, does not interfere, by prohibiting commerce with either or all the powers at war, so long, it should seem, the nation does not transgress the laws of neutrality. However, a power at war having a right to hinder its enemy from reinforcing itself by the reception of warlike stores, necessity may authorize it to prevent merchandize of this kind from being conveyed to the enemy by a neutral power<sup>2</sup>.

It is generally acknowledged, that a neutral power ought not to transport to either of the belligerent powers merchandizes unequivocally intended for warlike purposes. But as necessity is the only reason which can authorize a restriction of the trade and navigation of neutral nations, goods which have no relation to war must be carefully distinguished from those which are peculiarly subservient to it. Arms, military and naval stores, ship-timber, pitch and tar<sup>3</sup>, cables, hemp, provisions, &c. (but cordilla hemp being unfit for

<sup>1</sup> Hoop, 1 Rob. Adm. Rep. 200.

<sup>2</sup> Marten's Law of Nations, 328. Vattel's Law of Nations, b. iii. c. 7. s. 111. Puff. lib. iv. c. 6. Grot. lib. ii. c. 9.

<sup>3</sup> 1 Rob. Adm. Rep. 241.

naval purposes is held not to be contraband<sup>1</sup>), are prohibited as contraband.

Provisions, however, are not generally deemed contraband, but may become so under particular circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. Grotius speaks of them as articles *promiscui usus*, and specifies some circumstances under which they may become contraband. Those circumstances are of a very particular nature, such as the relief of places in distress; and the general character is to be considered as innocent, and free for all purposes of traffic, unless under such particular situations and circumstances.

Among the causes of exemption which tend to prevent provisions from being treated as contraband, one is, that they are of the growth of the country which exports them. Another circumstance to which some indulgence, by the practice of nations, is shown, is when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use.

But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use? Of the matter of fact, on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test: if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of

<sup>1</sup> 4 Rob. 91.

naval military equipment, it shall be intended the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption ; for, it being impossible to ascertain the final application of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination ; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful <sup>1</sup>.

The list of those merchandizes, commonly called contraband, is expressed in treaties of commerce. And since the latter end of the seventeenth century the maritime powers began to issue declarations at the beginning of a war, to advertise the neutral powers that they shall look upon such and such merchandizes as contraband, and to forewarn them of the penalties they intend to inflict on those who shall be found conveying them to the enemy. These declarations are rather advertisements than laws, nor can their effects be by any means extended to those neutral powers with which the powers that issue them have treaties of commerce, in which this matter is settled <sup>2</sup>.

A nation that authorizes contraband commerce is looked upon as having violated its obligations of neutrality ; and the belligerent power against which such power operates, confiscates the contraband merchandize, and sometimes the vessel too. It seems to have been the rule formerly to confiscate both, when the proprietor of the vessel had knowingly and voluntarily loaded his vessel with contraband merchandize, whether in whole or in part <sup>3</sup>. Bynkershoek and

<sup>1</sup> The *Jonge Margaretha*, 1 Rob. Adm. Rep. 192.

<sup>2</sup> Marten's Law of Nations, 332.

<sup>3</sup> *Ibid.* 333. Vattel's Law of Nations, b. iii. c. 7. s. 113.

Heineccius both agree that the penalty ought to attach equally on the ship, as well as on the cargo. *Publicabam quoque naves amicas si scientibus dominis contrabanda ad hostes deferrent; et nisi pacta impediant omnino publicandæ sunt quia earum domini operantur rei illicitæ*<sup>1</sup>. On the same principle Heineccius, *Quemadmodum ejusmodi pacta ad exceptionem pertinent; ita facile patet regulam istis non tolli, adeoque certi juris esse, ob merces illicitas naves etiam in commissum cadere*<sup>2</sup>. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that act, but only incurs the forfeiture of freight and expenses. But this rule is liable to exceptions: Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers, or where the contraband goods are taken on board with the actual or presumed knowledge of the owner; the circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one<sup>3</sup>.

Whether an enemy's effects found on board of a neutral ship are subject to confiscation or not by the rights of war, is a matter of variance among the writers on the laws of nations. Groſius<sup>4</sup> and Vattel<sup>5</sup> are of opinion that they are confiscable. But Marten is of a contrary opinion. It was formerly a rule, almost generally adopted by the nations of Europe, to return to the proprietors the neutral goods taken on board of an enemy's vessel, and to confiscate the goods of an enemy found on board of a neutral

<sup>1</sup> Bynk. Quæst. Jur. Pub.

<sup>2</sup> De Nav. ob Vect. Merc. Vectit. Commiss. c. 2. s. 6.

<sup>3</sup> The Ringende Jacob, 1 Rob. Adm. Rep. 89. The Franklin, 3 Ibid. 217. The Johanna Tholen, 6 Ibid. 72. The Atalanta, 6 Ibid. 459. The Neutralitet, 3 Ibid. 295.

<sup>4</sup> Lib. iii. c. 6. s. 6.

<sup>5</sup> B. iii. c. 7. s. 115.

vessel. But the disputes arising from the observance of this rule, and the very great inconvenience it brought on the commerce of neutral nations, gave rise to an entirely new principle. According to this principle, regard is had to the property of the vessel, and not of the goods; so that a neutral vessel saves the goods of an enemy, and neutral goods found on board of an enemy are confiscated <sup>1</sup>.

This principle has been adopted in almost all the treaties of commerce made since the middle of the seventeenth century, and has been observed even by the greatest of powers having no treaties with each other. Yet in some treaties of commerce the ancient principle has been adhered to, and, in others, a different rule has been established <sup>2</sup>.

If the voyage and commerce are not of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country, it is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; though the neutral thereby subjects his ship to be detained and carried into a British port for the purpose of search <sup>3</sup>.

The carrying of hostile dispatches by a neutral vessel is a criminal act, and will subject the vessel to condemnation, if they are fraudulently concealed and suppressed from the knowledge of the captor. And in case of a cargo being on board, and a direct participation in such concealment can be proved or presumed on the part of the constituted agents of the cargo, it will also be liable to confiscation <sup>4</sup>.

But dispatches from an ambassador of the enemy's state, resident in a neutral country for the purpose of preserving the relations of amity between that state and his own go-

<sup>1</sup> Marten's Law of Nations, 336.

<sup>2</sup> Ibid. 337.

<sup>3</sup> *Barker v. Blake*, 9 East's Rep. 283.

<sup>4</sup> *The Atalanta*, 6 Rob. Adm. Rep. 440.



vernment, found on board of a neutral vessel, will not work a condemnation<sup>1</sup>.

A neutral ship engaged as a transport in the military service of the enemy is liable to confiscation. And the number of persons so conveyed is immaterial<sup>2</sup>.

Where a capture is made of a cargo the property of an enemy carried in a neutral ship, the neutral ship-owner obtains against the captor those rights which he had against the enemy. At the same time, this principle is not so universal as not to be liable to some exceptions; as, for instance, in the known case of contraband goods. If an enemy puts on board a neutral vessel a cargo belonging to himself, which is a contraband cargo, and that cargo is taken, it is condemnable to the captor: but the Court of Admiralty will not consider itself bound to enforce the payment of freight against the captors, although at the same time the neutral ship-owner might have just reason to demand it from the enemy<sup>3</sup>.

By the general law of nations, it is not competent to neutrals, in time of war, to assume, on particular indulgences, or on temporary relaxations arising from the state of war, a trade with the colony of the enemy which was not permitted in time of peace. The application of this general rule, however, has from time to time been qualified by some regulations.

Soon after the commencement of the late war<sup>4</sup>, the first set of instruments that issued were framed, not on the exception of the American war, but on the antecedent practice; and directed cruizers "to bring in for lawful adjudication all vessels laden with goods, the produce of any colony of France, or carrying provisions or supplies for the

<sup>1</sup> *The Caroline*, 6 Rob. Adm. Rep. 461.

<sup>2</sup> *The Orozembo*, 6 *ibid.* 420.

<sup>3</sup> *The Emanuel*, 1 *ibid.* 296.

<sup>4</sup> Nov. 6th, 1793.

use of any such colony." The relaxations that have since been adopted have originated chiefly in the change that has taken place in the trade of that part of the world since the establishment of an independent government on the continent of America. In consequence of that event, American vessels had been permitted to trade in some articles, and on certain conditions, with the colonies both of this country and of France. Such a permission had become a part of the general commercial arrangements, as the ordinary state of their trade in time of peace. The commerce of America was therefore abridged by the foregoing instructions, and debarred of the right generally ascribed to neutral trade in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American government to this effect, new instructions to our cruizers were issued 8th January 1794, apparently designed to exempt American ships trading between their own country and the colonies of France. The directions were, "to bring in all vessels loaden with goods, the produce of the French West India islands, and coming directly from any port of the said islands to any port in Europe."

In consequence of this relaxation of the general principle in favour of American vessels, a similar liberty of resorting to the colonial market for the supply of their own consumption was conceded to the neutral states of Europe: To this effect, a third set of public instructions issued 25th Jan. 1798, which recite, as the special cause of further alteration, "the present state of the commerce of this country, as well as that of neutral states," and direct cruizers "to bring in all vessels coming with cargoes, the produce of any island or settlement of France, Spain, or Holland, and coming directly from any port of the said islands or settlements to any port of Europe, not being a port of this kingdom,

dom, nor a port of the country to which such ships, being neutral ships, belonged<sup>1</sup>.”

The port of the country of the *vessel* is here only mentioned. The Court of Admiralty has, however, allowed the benefit of the same rule to cases of a neutral vessel of our country going from an enemy's colony to the port of the owner of the cargo, being also a neutral port<sup>2</sup>.

By this relaxation, neutral vessels were allowed to carry on a direct commerce between the colony of the enemy and their own country.

On the illegality of the trade between the colony and the parent state of that colony a solemn decision was pronounced in the Court of Admiralty, in the case of the *Immanuel*<sup>3</sup>. In that case, the judge entered much at length into the nature of colonial establishments, and adverted to the prohibition intimated in the first instructions of 1793, as the rule, to be applied in all cases, which did not fall within the reach of any relaxation. In that instance, a cargo taken in at Bourdeaux, to be carried to St. Domingo, as asserted, on the actual account and risk of neutral merchants, was condemned on the question of law. And in the case of the *Rose, Young*, from Holland to Guadaloupe, which happened on the same day, a trade between the country of one belligerent and the colony of an allied enemy were held to stand upon the same footing<sup>4</sup>.

By a variety of decisions, then, the illegality of voyages from the colonies of the enemy to neutral ports in Europe, not being the ports of the proprietors of the ship or cargo, nor a port of this kingdom, is fully established<sup>5</sup>.

But upon the breaking out of war it is the right of neutrals to carry on their *accustomed trade*, to the utmost extent

<sup>1</sup> 4 Rob. Adm. Rep. Append. 1.

<sup>2</sup> Ibid. 3. n.

<sup>3</sup> 2 Rob. Adm. Rep. 186.

<sup>4</sup> Ibid. 3.

<sup>5</sup> Ibid. passim.

of which that accustomed trade is capable, with an exception of the particular cases of a trade to blockaded places; or in contraband articles. Therefore, if a trade is universally allowed to the colonies of the enemy during peace, with the exception of a monopoly in certain articles, it is not illegal for neutrals to trade thither in time of war.

Formerly, neutral vessels engaged in the coasting trade of the enemy were subject to condemnation. But in later times, which have admitted many relaxations in favour of the navigation of neutral states, the penalty on vessels so employed has been reduced to a forfeiture of the freight<sup>1</sup>.

By the law of England, the purchase of vessels in the enemy's country is permitted to neutrals, provided a bill of sale properly authenticated is produced<sup>2</sup>. But it is to be observed, that the purchase of such vessels in time of war is liable to great suspicion; and that suspicion is increased when the asserted neutral purchaser appears to be personally residing in the enemy's country at the time of the sale<sup>3</sup>.

An enemy's vessel ostensibly transferred to a neutral merchant, and continuing in the enemy's trade, is liable to condemnation. For it is a known and established rule with respect to a vessel, that if she is navigating under the pass of a foreign country, she is considered as bearing the national character of the nation under whose pass she sails: she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country. In like manner, and upon similar principles, if a vessel purchased in the enemy's country is, by constant and habitual occupation, continually employed in the trade of that country, commencing with the war, continuing during the war, and evidently on account of the war, on what ground, Sir Wil-

<sup>1</sup> The *Johanna Tholen*, 6 Rob. Adm. Rep. 72; 1 *Ibid.* 296.

<sup>2</sup> The *Wekwart*, 1 *Ibid.* 122.

<sup>3</sup> The *Bernen*, 1 *Ibid.* 101.

be asserted, that the vessel is not to be deemed a ship of the country from which she is so navigating, in the same manner as if evidently belonging to the inhabitants of it<sup>1</sup>?

A lien on the freight, and a title of property in a parcel of goods pledged for the payment of the purchase money of the ship, will not entitle a neutral to claim a ship and cargo ostensibly hostile. The captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be over-ruled by liens which could not in any manner come to their knowledge<sup>2</sup>.

### *Of Licenses.*

Although it is an established principle of international law, that all commercial intercourse is interdicted between belligerent nations, the operations of war being inconsistent with the relations of commerce; yet since the world has grown more commercial, a practice has crept in of admitting particular relaxations, which, if sanctioned by the special license of their respective governments, are legal<sup>3</sup>. In the passage before cited from Bynkershoek, he proceeds to observe, that the interests of trade, and the necessity of obtaining certain commodities, have sometimes so far overpowered the rule of prohibition of commercial intercourse between hostile states, that different species of traffic have been permitted “*prout e re suâ, subditorumque suorum esse censent principes.*”

<sup>1</sup> The *Vigilantia*, 1 Rob. Adm. Rep. 1.

<sup>2</sup> The *Marianna*, 6 Ibid. 24.

<sup>3</sup> The *Hoop*, 1 Ibid. 196. 1 Ves. 317.



These relaxations, termed "licenses," are defined by Sir William Scott, in the case of the *Cosmopolite*<sup>1</sup>, to be an high act of sovereignty; an act immediately proceeding from the sovereign authority of the state, which is alone competent to decide on all the considerations of commercial and political expediency, by which an exception from the ordinary consequences of war must be controlled. In their construction, they must not be carried further than the intention of the great authority which grants them may be supposed to extend. I do not say, adds the same learned and eloquent judge, that they are to be construed with pedantic accuracy, or that every small deviation should be held to destroy the effect of them: an excess in the *quantity* of the goods permitted might not be considered as noxious to any extent; a variation in the *quality* or *substance* of the goods might be more significant, because a liberty of importing one species of goods, under a license granted to import another, might lead to very dangerous abuses. And therefore where a license had been obtained for permission to import the following enumerated articles—barilla, wool, liquorice, orchilla wood, and dyeing wood,—a quantity of wines and some hides being also imported,—this part of the cargo, not being provided for in the enumeration, was held to be subject to condemnation<sup>2</sup>.

Another material circumstance in all licenses is the limitation of time in which they are to be carried into effect; for as it is in the view of government, in granting these licenses, to combine all commercial and political considerations, a communication with the enemy might be very proper at one time, and at another very unfit and highly mischievous. It therefore seems, that a license granted in 1799 would not be good for an importation in 1801<sup>3</sup>.

<sup>1</sup> 4 Rob. Adm. Rep. 11.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

And if it be provided in such license that the party acting under it shall give bond for the due exportation of the goods to the places proposed, and they are exported without such bond being given, such exportation is illegal. Neither will it be sufficient, where a license has been granted to export and deliver goods to an enemy's country for a limited time, if the goods are shipped before the expiration of the time, the ship not sailing till afterwards<sup>1</sup>.

So where a license was obtained for importing to an enemy's port certain enumerated articles,—other articles not inserted in the enumeration, sent on the part of a British subject, are liable to condemnation, notwithstanding, after the privileged part of the cargo had been delivered at such enemy's port, the non-enumerated articles had an ulterior destination to a neutral port<sup>2</sup>.

If a license is granted to two persons, their agents or bearers of their bills of lading, their interest is not transferable to others not originally concerned with them in the transaction; and therefore neither the grantors nor grantees of such license are entitled to restitution of property captured under such circumstances<sup>3</sup>.

A license to export goods to certain places within the influence of the enemy interdicted to British commerce, granted to H. N. on behalf of himself and other British merchants, is sufficient to protect the adventure under the license, if it appears that H. N. was the agent employed by the British merchants really interested in it to get the license, though he had no property in the goods himself<sup>4</sup>.

If a license is obtained, giving a neutral wider scope than the exceptions and conditions in the orders of council give,

<sup>1</sup> *Vandyck v. Whitmore*, 1 East's Rep. 475.

<sup>2</sup> *The Vriendschap*, 4 Rob. Adm. Rep. 96.

<sup>3</sup> *The Jonge Johannes*, 4 Ibid. 263.

<sup>4</sup> *Rawlinson v. Janson*, 12 East's Rep. 223.

and not referring thereto, he may avail himself of the privileges conferred by the license, and is not confined by the restrictions contained in those orders <sup>1</sup>.

But possession of a general license to trade with the enemy is not *primâ facie* evidence that the holder is entitled to hold and use it: if he seeks to cover his own interests under it, he must connect himself with it by other evidence than the mere possession; as by showing from whom and when he received it, and thereby connecting his own particular adventure with such general license: otherwise, in the absence of all proof of such connexion, there is a natural suspicion, a preponderance of probability, that the license had been used before to cover an antecedent voyage <sup>2</sup>.

Under a license to A. to import goods, the property of A., as specified in his bills of lading, if the goods be consigned to others with particular bills of lading, a general bill of lading signed to A., without proof of some special interest in A. in the goods, will not entitle the consignment to the benefit of the license. But it would have been otherwise if A. had had a special property in the goods <sup>3</sup>.

If the proprietary interest remains in subjects of a state in hostility with this country, the obtaining of a license for the importation of goods will be of no avail, but the property will be subject to condemnation <sup>4</sup>.

Neither will a license granted to a British merchant to *import*, extend to shipments which he personally superintends in an enemy's country, as a merchant of that country; but he will be deemed an exporter of goods in the latter character, rather than an importer in his former capacity; notwithstanding he had no established domicile or

<sup>1</sup> *Spitta v. Woodman*, 2 Taunt. 416.

<sup>2</sup> *Barlow v. Mcintosh*, 12 East's Rep. 311.

<sup>3</sup> *Ferze v. Waters*, 2 Taunt. 248.

<sup>4</sup> *The Aurora*, 4 Rob. Adm. Rep. 212.

fixed counting-house in such hostile state. It appears, however, from Sir William Scott's judgement in this case, that had the shipper of the goods gone into the enemy's country for the purpose of collecting debts, or for occasional purposes not originally connected with this transaction, and not with a view of making *future* mercantile arrangements, shipments made only for the purpose of collecting his debts would not be subject to confiscation<sup>1</sup>.

In the case of the *Juffrow Catharina*<sup>2</sup>, under a license to import certain raw materials, restitution of a parcel of lace not included in the enumerated articles, but which had been shipped under an order given previous to the commencement of hostilities, in return for a cargo sent out from this country, was ordered.

A license granted during the pendency of negotiation cannot be construed to extend to the contingency of a new war, which arises out of the inefficacy and inexecution of that treaty. And therefore a ship captured under such circumstances will be liable to condemnation<sup>3</sup>.

Where a license has been granted to trade with an enemy, the courts of justice will permit every thing to be done, though not expressed, which is necessary in order to effectuate the intention of the king in granting the license, from the principle of law, "*ut res magis valeat, quam pereat.*" Thus, in an action on a policy of insurance, where a certain trading with an alien enemy, for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the king's authority; it was held, that an insurance on an enemy's ship, as well as on the goods and specie put on board for the benefit of the British subjects, was incidentally le-

<sup>1</sup> The *Jouge Klassina*, 5 Rob. Adm. Rep. 297.

<sup>3</sup> The *Planters Wensch*, 5 Ibid. 22.

<sup>2</sup> 5 Ibid. 141.



galized ; and that it was competent for the British agent of both parties, in whose name an insurance was effected, to sue upon the policy in time of war : for although the king's license cannot, in point of law, have the effect of removing the personal disability of an alien enemy, in respect of suit, so as to enable him to sue in his own name ; it purges the trust, in respect to him, of all those injurious qualities, in regard to the public interest, which constitute the public ground of objection to the alien himself<sup>1</sup>.

So it has been held, that a native Spaniard domiciled here in time of war between this country and Spain, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain ports in Spain, such commerce is legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country ; for, in respect of such licensed trading, the subjects of Spain concerned in it are to be regarded as British subjects<sup>2</sup>.

The legal result of the license granted in this case is, said Lord Ellenborough, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalized for all purposes of its due and effectual prosecution. To hold otherwise, would be to maintain a proposition repugnant to national good faith and the honour of the crown. The crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war : and its license for such purpose ought to receive the most liberal construction. To say that the plaintiff might export the goods specified in the license from Great Britain to an ene-

<sup>1</sup> *Kensington v. Inglis*, in *Error*, 8 *East's Rep.* 273.

<sup>2</sup> *Usparicha v. Noble*, 13 *East's Rep.* 332.



my's country, for the benefit of himself or others, (and the license contains no restriction in this particular,) and yet to hold that, where he has so done, he could not insure, or, having insured, could not recover his loss, either on account of his original character of a native Spaniard, or on account of the places to which or of the persons to whom the goods were destined, would be to convert the license itself into an instrument of deception and fraud. The crown, in licensing the end, implicitly licenses all the ordinary legitimate means of attaining that end. For adequate purposes of state policy and public advantage, the crown, it may be presumed, has been induced in this instance to license a description of trading with an enemy's country, which would otherwise be unquestionably illegal. Whatever commerce of this sort the crown has thought proper to permit, (which, in respect of its prerogatives of peace and war, the crown is by its sole authority competent to prohibit or permit,) must be regarded by all the subjects of this realm, and by the courts of law when any question relative to it comes before them, as legal, with all the consequences of its being legal; one of which consequences is a right to contract with other subjects of the country for the indemnity and protection of such property in the course of its conveyance to its licensed place of destination, though an enemy's country, and for the purpose (as it probably will be in most cases) of being there delivered to an alien enemy, as consignee or purchaser. In the present case the license was obtained for the purpose of protecting the subject matter insured in the course of its conveyance by sea from England to certain ports in Spain, to be there delivered to the purchasers thereof, who are the persons in whom the interest is averred in the first and second counts of this declaration: and the action is well brought, upon the principles above stated, in the name of the plaintiff, for their benefit. For the

the purpose of this licensed act of trading (but to that extent only) the person licensed is to be regarded as virtually an adopted subject of the crown of Great Britain; his trading, as far as the disabilities arising out of a state of war are concerned, is British trading; and of course any argument to be drawn from a virtual participation in, and supposed privity to, the acts of his own native country, then at war with the crown of Great Britain, is excluded or superseded, in point of effect, by an express privity to, and immediate participation in, the adverse acts of the British government. As far as the plaintiff and the Spanish purchasers of this cargo are concerned, they are actually privy to the objects of the British government, and acting in furtherance thereof, and in direct opposition to the laws and policy of their own country. And it will not be contended to be illegal to insure a trade carried on in contravention of the laws of a state at war with us, and in furtherance of the policy of our own country and of its trade; and which this trade in question, sanctioned as it is by his majesty's license, must be deemed to have been.

Those ports of St. Domingo which are under the dominion of Christophe and the negroes engaged in hostility with France are neutral ports, and no license is necessary to legalize a trade with them<sup>1</sup>.

### *Of the Right of Visitation and Search.*

The right of visiting and searching merchant ships upon the high seas, whatever be the ships, the cargoes, or the destinations, is an established right of belligerent powers, founded on the law of nations, and acknowledged and referred to in the treaties of the states of Europe. It is admitted by all speculative writers on the law of nations.

<sup>1</sup> Johnson v. Greaves, 2 Taunt. 344.

Bynkershoek expressly admits it in these words: "Velim animadvertas eatenus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis in navi repertis constet, navem amicam esse<sup>1</sup>." And Vattel<sup>2</sup> acknowledges the penalty attending the contravention of this right by neutral ships to be confiscation. Even in cases where it is possible that this right may be wrongfully exercised by cruisers, resistance is not the legal remedy, as there is a regular and effectual remedy, provided by all the maritime codes of Europe, in the responsibility which cruisers lie under to make compensation, for any injurious exercise of this right, in costs and damages<sup>3</sup>.

Rescue by the crew of a neutral ship is considered as a resistance, and will subject the ship and cargo to condemnation<sup>4</sup>. But resistance by an enemy master will not affect the cargo, being the property of a neutral merchant<sup>5</sup>.

The evidences by which a ship is required to prove her neutrality are—1. the passport; 2. the sea letter or sea brief; 3. the bill of sale, if the ship appears to be built in an enemy's country; 4. the muster roll; 5. the charter-party; 6. the bill of lading; 7. the invoices; 8. the log-book or ship's journal; 9. the bill of health.

The absence, however, of these papers or documents will not subject the ship to confiscation.

### *Of Recapture.*

Capture from an enemy in time of war is a fundamental principle of international law<sup>6</sup>. There appears, however, to be no settled and uniform rule established in practice among nations, as to the precise period at which property

<sup>1</sup> Lib. i. c. 14.

<sup>2</sup> Lib. iii. c. 7. s. 114.

<sup>3</sup> 1 Rob. Adm. Rep. 343.

<sup>4</sup> The Dispatch, 3 Ibid. 278.

<sup>5</sup> The Catharina Elizabeth, 5 Ibid. 232.

<sup>6</sup> Bynk. Q. J. P. lib. i c. 6. Hale's Treatise, part ii. c. 28. in Hargrave's Law Tracts, 246.

is divested by capture. It seems to be generally agreed by writers on the laws of nations, that it is not every taking, and subsequent possession under that taking, which will constitute a capture in the legal sense of the word, or make it become the property of the captor; but there must be a firm possession. In this they all agree; but what shall be such a possession, as to vest the absolute property in the captor, is so much a matter of doubt, that it is difficult to find two writers of the same opinion. Grotius is of opinion, that the capture shall be deemed complete when the prize has been carried *infra præsidia*, as within the harbour or ports of the enemy, or where his whole fleet is stationed<sup>1</sup>. Emerignon says, that the right of the original proprietor ceases after the prize has been conducted into the middle of a fleet, or into a free port<sup>2</sup>. Vattel deems a capture which has been twenty-four hours in the possession of the enemy, legal<sup>3</sup>. To this opinion Marten lends his sanction<sup>4</sup>. Bynkershoek, however, seems to think that the *spes recuperandi* is the ground on which the question is to be decided<sup>5</sup>. He mentions the opinions of some writers, who think that it is necessary for the ship to have arrived in the enemy's port before the property can be said to be changed. Roccus seems to lean to the idea, that it is necessary to bring the ship within the confines of the captor, and to keep it there a night in safe custody<sup>6</sup>.

But by the marine law of England, there is no change of property, in case of capture, so as to bar the owner in favour of a vendee or recaptor, till there has been a sentence of condemnation. The very learned Judge of the Court of Admiralty, in the cases of the *Flad Oyen*<sup>7</sup>, and the *Henrick and Maria*<sup>8</sup>, has said, As to the time when property

<sup>1</sup> Grot. lib. iii. c. 6. s. 3.

<sup>3</sup> Vattel, b. iii. s. 196.

<sup>5</sup> Q. J. P. lib. i. c. 4.

<sup>7</sup> 1 Rob. Adm. Rep. 134.

<sup>2</sup> Vol. i. p. 494.

<sup>4</sup> p. 299.

<sup>6</sup> Not. 66.

<sup>8</sup> 4 Ibid. 55.



is to be deemed converted by capture, the ancient law of Europe<sup>1</sup> held, that bringing *infra præsidia* was absolutely necessary to fortify the possession of the captor, and divest the original proprietor of his claim. Some nations have indeed, by later regulations, substituted a possession of twenty-four hours as a state of sufficient security ; but it is an alteration which does not appear to be founded on any national principle, and has never been admitted into the practice of the English Prize Courts. In later times, an additional formality has been required, that of a sentence of condemnation, in a competent court, decreeing the capture to have been rightly made *jure belli* ; it not being thought fit, in civilized society, that property of this sort should be converted without the sentence of a competent court pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. The purposes of justice require, that such exercises of war should be placed under public inspection ; and therefore the mere *deductio infra præsidia* has not been deemed sufficient. I apprehend, that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary, and that a neutral purchaser in Europe during war looks to the legal sentence of condemnation as one of the title deeds of a ship, if he buys a prize vessel. Agreeably to this principle, judgement was given in that court, decreeing restitution of a ship retaken by a privateer, though she had been fourteen weeks in the enemy's possession. Another case also, upon the same principle, was decided against the vendee after a long possession, two sales, and several voyages.

Among the subjects of England, no capture by the enemy can be so total a loss as to leave no possibility of recovery.

<sup>1</sup> Consol. del Mar. c. 287. Bynk. Q. J. P. lib. iv. et v.



By the statutes 13 Geo. II. c. 4., 29 Geo. II. c. 34. s. 24., 33 Geo. III. c. 66. s. 42., and 43 Geo. III. c. 160. s. 39., if an English ship, either a man of war or a privateer, retake any ship or vessel belonging to any of his majesty's subjects, and which had been captured by the enemy, the owner is entitled to restitution, upon paying for salvage the sums mentioned in the statutes, unless the ship so retaken shall appear to have been set forth by his majesty's enemies as a ship of war; in which case she shall be condemned as lawful prize to the captors.

On recapture of the property of allies, the law of England restores on salvage, till it appears that they act towards British property on a less liberal principle: in such a case it adopts their rule, and treats them according to their own measure of justice<sup>1</sup>.

A sentence of condemnation pronounced by a consul or minister of a belligerent power, in the country of a neutral power to which the prize had been taken, is contrary to the law of nations, and void; and therefore the property never having been divested out of the original owner, ships have been restored as well upon recapture from the purchaser<sup>2</sup> as upon arrest in a port of this country<sup>3</sup>. But a condemnation of a ship carried into a neutral port, is, while remaining there, valid, though made in the country of the captors<sup>4</sup>. And a prize carried into the ports of an ally of the captor may be legally condemned either there by a consul belonging to the nation of the captors<sup>5</sup>, or in the country of the captors<sup>6</sup>.

It may be proper to mention here, that by the late prize acts<sup>7</sup>, if a ship be retaken before she has been carried into

<sup>1</sup> The Santa Cruz, 1 Rob. Adm. Rep. 49.

<sup>2</sup> The Elad Oyen, 1 Ibid. 135.

<sup>3</sup> The Kierlighett, 3 Ibid. 96.

<sup>4</sup> The Henrick et Maria, 4 Ibid. 43.

<sup>5</sup> The Betsy, 2 Ibid. 210. n.

<sup>6</sup> The Christopher, 2 Ibid. 209.

<sup>7</sup> 33 Geo. III. c. 66. s. 44. 43 Geo. III. c. 160. s. 41.

an enemy's port, it shall be lawful for her, with consent of the recaptors, to prosecute her voyage, and it shall not be necessary for the recaptors to proceed to an adjudication for six months, or till her return to the port from which she sailed; and it shall be lawful for the master, owners, &c. with the consent of the recaptors, to unliver and dispose of the cargo before adjudication; and in case the vessel shall not return directly to the port from which she sailed, or the recaptors shall have had no opportunity of proceeding to adjudication within the six months, on account of the absence of the said vessel, the Court of Admiralty shall, at the instance of the said recaptors, decree restitution to the former owners, paying salvage upon such evidence as to the said court, under all the circumstances of the case, shall appear reasonable, the expense of such proceeding not to exceed the sum of fourteen pounds.

To prevent the chance of recapturing the ships which may be captured of his majesty's subjects, it is declared illegal, by the statutes 22 Geo. III. c. 25. and 33 Geo. III. c. 66., for the captains or owners of any British ships who may be captured, to ransom themselves from the enemy; and the contract to ransom is not only declared absolutely void, but the parties entering into it are punished by fine. And by a still later act (43 Geo. III. c. 160.) the above provisions are continued; and by the 33d section, if any captain of a privateer shall agree to ransom any ship or cargo taken as prize, and shall in pursuance of such agreement set the prize at liberty, instead of bringing the same into the ports of his majesty's dominions, unless in a case of extreme necessity to be allowed by the Court of Admiralty, he shall forfeit his letter of marque, and shall suffer such penalties of fine and imprisonment as the said court shall adjudge.

*Of Reprisals.*

Reprisals are used between nation and nation to do justice to themselves, when they cannot otherwise obtain it<sup>1</sup>. One of the species of reprisals the most frequently employed, is the seizure of the property and persons of the subjects belonging to the state from which an injury has been received<sup>2</sup>. Effects seized are preserved while there are any hopes of obtaining satisfaction or justice. As soon as this hope is lost, they are confiscated, and then the reprisals are accomplished. If the two nations upon this quarrel come to an open rupture, satisfaction is considered as refused, from the moment of the declaration of war, or the first hostilities, and then also the effects seized may be confiscated<sup>3</sup>.

A state can make reprisals for injuries committed against itself or against its subjects; but not in favour of a third person<sup>4</sup>.

By right, there are many persons exempted from reprisals; and those whose persons are so privileged have also protection for their goods, some by the law of nations, some by the civil law, others by the common law; among whom, ambassadors, by the law of nations, their retinue and goods, are exempt, coming from him who awarded reprise<sup>5</sup>.

Travellers through a country, whose stay is but short, and a merchant of another place than that against which reprisals are granted, although the factor of his goods was of that place, are not subject to reprisals<sup>6</sup>.

When ships are driven into port by storm or stress of weather, they have an exemption from the law of reprisals, according to the *jus commune*, though by the law

<sup>1</sup> Vattel, b. ii. s. 342.

<sup>2</sup> Bynkershoek, *Quæst. Jur. Pub. lib. i. c. 24.*

<sup>3</sup> Vattel, b. ii. s. 342.

<sup>4</sup> Marten's *Law of Nations*, 226. *Grot. lib. iii. c. 2.* Vattel, b. ii. s. 348.

<sup>5</sup> Beawes's *Lex Merc.* 235.

<sup>6</sup> *Ibid.*

of England it is otherwise, unless expressly provided for in the writ of commission: but if such ships fly from their own country to avoid confiscation, or for some other fault, and are driven in by stress of weather, they may in such case become subject to be prize; though it is unlawful to make seizure in any ports for reprisals, but in that prince's who awarded them, or in his against whom the same is issued<sup>1</sup>.

### *Of Embargo.*

An embargo is an arrest laid on ships or merchandize by public authority, or a prohibition of state commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports<sup>2</sup>. This term has also a more extensive signification; for ships are frequently detained to serve a prince in an expedition, and for this end have their loading taken out, without any regard to the colours they bear, or the princes to whose subjects they belong. The legality of such a measure has been doubted by some<sup>3</sup>; but it is entirely conformable to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports, that may contribute to the success of his enterprise. Embargoes laid on shipping in the ports of Great Britain, by royal proclamation, in time of war, are strictly legal, and will be equally binding, as an act of parliament; because such a proclamation is founded on a prior law, namely, that the king may prohibit any of his subjects from leaving the realm. But in times of peace the power of the king of Great Britain to lay such restraints is doubtful; and therefore when such a proclamation issued in the year 1766, against the words of the statute then in force, although absolutely necessary for

<sup>1</sup> Beawes's *Lex Merc.* 235.

<sup>2</sup> *Ibid.* 260.

<sup>3</sup> Grotius *de Jure B. ac P. lib. ii. c. 2. s. 10.* Marten's *Law of Nations*, 326.

the prevention of a dearth in the country, it was thought prudent to procure an act<sup>1</sup> of the legislature to indemnify those who advised or who acted under that proclamation<sup>2</sup>.

### *Of Blockade.*

Though the commerce of neutral nations ought to be unrestrained as far as the laws of war will admit, yet there is a particular case where the rights of war extend still further. All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry any thing to the besieged, without my leave: for he opposes my enterprise; may contribute to the miscarriage of it; and thus cause me to fall into all the evils of an unsuccessful war<sup>3</sup>.

But a declaration of blockade is not to be extended by those employed to carry it into execution. Therefore a general notice of a blockade of the coast of Holland, untrue in fact, will not be good by limitation or construction for Amsterdam, the only Dutch port which was then under blockade<sup>4</sup>.

With respect to the extent of a blockade, Sir William Scott in the case of the *Stert* observed, that where no actual blockade can be applied, a legal blockade cannot exist. In the very notion of a complete blockade it is included, that the besieging force can apply its power to every point of the blockaded state. If it cannot, it is no blockade of that quarter where its power cannot be brought to bear<sup>5</sup>.

<sup>1</sup> 7 Geo. III. c. 7.

<sup>2</sup> 1 Blackstone's Commentaries, 270. Park's Insurance, 104.

<sup>3</sup> Yattel, b. iii. c. 7. s. 117.

<sup>4</sup> The *Henrick and Maria*, 1 Rob. Adm. Rep. 148.

<sup>5</sup> 4 Ibid. 66.

*See pages 574 to follow for  
"Postliminium" PART*



## PART V.

HOW THE COMMERCE OF GREAT BRITAIN IS AFFECTED  
BY ITS OWN MUNICIPAL REGULATIONS.

HAVING treated of the manner in which the commerce of a country may be affected by the law of nations, we proceed to inquire how the commerce of Great Britain is affected by its own municipal regulations.

## CHAPTER I.

## OF THE LIBERTY OF TRADE.

*By natural-born Subjects.*

IN England freedom of trade is not only allowed by common law, but is asserted and established by various statutory provisions. By the stat. 15 Edw. III. c. 3. it is enacted, that the seas shall be open to all merchants to pass with their merchandize where they please. But though every possible encouragement was given to the extension of foreign commerce, yet, in early times, several regulations were made, restrictive of the common law right of the liberty of exercising trade.

By the stat. 37 Edw. III. c. 6. every man was required to confine himself to one mystery or trade. And by the 5 Eliz. c. 4. it is enacted, that no one shall exercise any art, mystery, or manual occupation, within the realm of England or Wales, without having previously served as an apprentice therein for seven years; nor set any person on work, in such mystery, art, or occupation, except he shall

have been apprentice, as is aforesaid; on pain of forfeiting for every default forty shillings for every month.

This statute, however, being in restraint of the common law, the resolutions of the courts have rather confined than extended the restriction. It has therefore been held, that if a person has without interruption worked at, or in any manner followed, a trade for seven years, either as master, servant, or inmate, at home or beyond sea, he is not subject to the penalties of this statute, although he has never been an apprentice or bound to the trade. In like manner, if the wife of a tradesman is employed in his business for seven years, and he dies, she may use the trade after his death<sup>1</sup>. So, by a particular custom in any town or village, a widow may continue her husband's business<sup>2</sup>. A service as an apprentice for six years, and one year as a journeyman<sup>3</sup>, or as a clerk and porter for fifteen years<sup>4</sup>, has been held sufficient to entitle the party to the benefit of this statute. So, it is sufficient if the party has followed a trade for seven years abroad<sup>5</sup>; and the term of seven years may be made out by months and weeks at different times<sup>6</sup>: but a service of five years abroad will not be a sufficient compliance with the statute, although the law of that country does not require a longer period<sup>7</sup>.

It has also been decided, that if a person uses a trade merely for the use of his family, and not with a view to gain a profit, he is not within the statute<sup>8</sup>. So, if a person advances a sum of money in a trade, and becomes a partner, but does not interfere in the executive part of the business, he is not liable to the penalties of the statute<sup>9</sup>. And if a man who has not served an apprenticeship himself, exports or sells goods which have been manufactured by journey-

<sup>1</sup> 1 Barnardiston, 367.

<sup>3</sup> 3 Keb. 400.

<sup>5</sup> 1 Salk. 67.

<sup>7</sup> 10 Mod. 70.

<sup>8</sup> 8 Co. 129.

<sup>\*</sup> Raynard v. Chase, 2 Wils. 40.

<sup>2</sup> Bac. Abr. Master and Servant, D. 2.

<sup>4</sup> Peake's N. P. C. 148.

<sup>6</sup> 1 Saund. 309. n. 6.

<sup>11</sup> Ibid. 54. a. Cro. Car. 499. Hob. 211.

<sup>1</sup> Bur. 2. S. C.

men who have regularly served and been employed by him, he is not within the act, if he has not interfered in the manual occupation of the trade <sup>1</sup>. Neither is a person who carries on particular branches of a general business by such as have served an apprenticeship to those particular branches of the business in which they are employed, subject to the penalties of the statute, if he merely exercises such particular trade incidentally as a branch of his general business; for the statute applies only to those who substantively set up and exercise a trade without having served an apprenticeship. And therefore a master coach-maker may lawfully employ journeymen blacksmiths to make the iron-work for coaches, as may a master carpenter journeymen sawyers, although the one may not have served an apprenticeship to the trade of a blacksmith, nor the other to that of a sawyer <sup>2</sup>.

Neither is a person who carries on a trade as trustee only for children, and who does not assist in the several operations, or take any part in the conduct of the business, liable to the penalty of the statute, for carrying on a trade without having served an apprenticeship <sup>3</sup>.

Neither does the statute restrain a man from exercising several trades at the same time, if he has served an apprenticeship to each <sup>4</sup>. It has also been decided that this statute does not extend to a person who works as a journeyman, though he has not served an apprenticeship, but that his master is liable to the penalty <sup>5</sup>.

Neither are employments which do not require skill and experience within the statute; and consequently a hemp-

<sup>1</sup> 1 Saund. 312. n. 1.

<sup>2</sup> Coward v. Maberly, 2 Camp. N. P. C. 127. Spencer v. Mann, 5 Esp. N. P. C. 110.

<sup>3</sup> Meazcan v. Pearsall, 6 Esp. N. P. C. 1.

<sup>4</sup> Carth. 163. 1 Bl. Rep. 233. 2 Wils. 168.

<sup>5</sup> Beach v. Turner, 4 Bur. 2449. 2 Mod. 315.

dresser, husbandman, and the like, are not required to serve an apprenticeship<sup>1</sup>.

It has been said, that for trading in a country village apprenticeships are not required by the statute<sup>2</sup>; but the better opinion, Mr. Serj. Williams observes in his note to the case of *Rex v. Kilderby*<sup>3</sup>, seems to be, that the statute does include villages.

To the prohibitions also of the statute, some exceptions have been introduced in favour of particular trades and persons. By 6 and 7 W. III. c. 17. an apprentice convicting two offenders guilty of coining shall be entitled to his freedom, and may exercise his trade as if he had served out his time. By 15 Car. II. c. 15. hemp-workers of all kinds, net-makers, and makers of tapestry hangings, may exercise their trades without having served an apprenticeship. By 17 Geo. III. c. 33. dyers in Middlesex, Essex, Surry, and Kent, may employ journeymen who have not served apprenticeships. As may hatters by the 55th section of the same statute, and woolcombers by 35 Geo. III. c. 124. By 24 Geo. III. st. 2. c. 6. all officers, mariners, and soldiers, may, if they have not deserted their wives and children, exercise such trades as they are sufficient to, in any town or place. By 26 Geo. III. c. 107. every person having served in the militia, when drawn out into actual service may, if a married man, exercise any trade in any town or place. And by 50 Geo. III. c. 41. hawkers and pedlars duly licensed are authorised to trade.

No trades are held to be within the statute but such as are enumerated in its provisions, or were used and exercised at the time of making it<sup>4</sup>.

The trades within the statute are: Bakers, barbers, brewers, drapers, feldmongers, fruiterers, ironmongers, knife-

<sup>1</sup> Cro. Car. 409.

<sup>3</sup> 1 Saund. 311.

<sup>2</sup> 1 Bl. Com. 128.

<sup>4</sup> Viz. January 12th, 1562.

haft-makers, point-makers, soap-makers, spurriers, tanners, tailors, tilers, upholsterers<sup>1</sup>, cable-makers, horners, mercers, millers, milliners, pin-makers, pippin-mongers, salesmen, salters, scriveners, silk-weavers, surgeons, tallow-chandlers,<sup>2</sup> taggers of points, weavers of silk, wool-combers<sup>3</sup>, comb-makers, cooks, cook-shops, shoe-makers<sup>4</sup>, arrow-head-makers, bowyers, cappers, clothiers, cloth-workers, curriers, cutlers, dyers, ferriers, fletchers, fullers, gloves, hat-makers, hosiers, pewterers, saddlers, sheremen, smiths, tuckers, turners<sup>5</sup>.

The trades not within the statute are : Braziers, butchers, collar-makers, fellmongers, mantua-makers, rope-makers, seamstresses<sup>6</sup>, coster-mongers, gardeners, hemp-dressers<sup>7</sup>, husbandmen, merchants, merchant tailors<sup>8</sup>, coach-makers<sup>9</sup>.

*By Merchants Strangers.*

The law of England, as a commercial country, observes Mr. Justice Blackstone, pays a very particular regard to the interests of foreign merchants. Magna Charta, which is confirmed by two subsequent statutes<sup>10</sup>, forms the foundation of the indulgences which alien merchants enjoy in this realm. By this statute it is provided, that all merchants (unless publicly prohibited before hand) shall have safe conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandize, without any unreasonable imposts, except in time of war : and if a war break out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war ; and, if ours be secure in that land, they shall be secure in ours.

<sup>1</sup> Com. Dig. title Trade, D. 5.

<sup>2</sup> Vin. Abr. tit. Trade, A.

<sup>3</sup> Bac. Abr. title Master and Servant, D. 2.

<sup>4</sup> 5 1 liz. c. 4.

<sup>5</sup> Vin. Abr. tit. Trade, A.

<sup>6</sup> Com. Dig. tit. Trade, D. 6.

<sup>7</sup> Bac. Abr. tit. Master and Servant, D. 1.

<sup>8</sup> 2 Camp. N. P. C. 397.

<sup>9</sup> 1 Ed. III. c. 29. 9 Ed. III. st. 1.



This protection of aliens in the exercise of commerce is further secured by the statute of the Staple, 27 Ed. III. st. 2. c. 2. as well as by numerous other statutes. By this statute it is ordained, that all merchant strangers, not of enmity, may safely come and dwell in the realm, where they will, and thence return with their ships, wares, &c. and freely buy and sell within the realm, paying the customs and subsidies due thereon. And by stat. 9 Ed. III. c. 1.<sup>1</sup> whoever gives disturbance shall be subject to double damages.

And by stat. 27 Ed. III. st. 2. c. 17. in case of war, all merchant strangers shall have convenient time, by proclamation, to sell their goods and depart; and if they are prevented by sickness or any other accident, they shall have a further extension of the time.

But though aliens are allowed the free exercise of trade in Great Britain, yet by the stat. 12 Car. II. c. 18. s. 2. no alien, unless naturalized, or made denizen, shall exercise the trade of a merchant or factor in the English plantations in Asia, Africa, or America, on pain of forfeiting all his goods, &c.

And to prevent frauds in colouring strangers' goods, wares, or merchandizes passing inwards or outwards, it is enacted by the 10th section of the 13th and 14th of the same king, that the children of aliens under 21 years of age shall not be traders, and that no goods or merchandize shall be entered in their names.

So by stat. 6 Hen. IV. c. 4. merchants strangers shall not carry, or cause to be carried, out of the realm any merchandizes brought within the realm by such alien merchants.

The statute of 1 Ric. III. c. 9. which prohibited an alien artificer from exercising any trade in England, unless as servant to a subject, or to make any cloth, or to sell wares by

<sup>1</sup> Confirmed by 2 Ric. II. c. 1. and 11 Ric. II. c. 7.

retail, is held to be virtually repealed by the 5 Eliz. c. 4.<sup>1</sup> As is also the 1 Ric. III. c. 9. and 14 Hen. VIII. c. 2. which prohibited a stranger artificer from taking any servant or apprentice, and employing above two journeymen, not subjects; together with the 21 Hen. VIII. c. 16. which prohibited such alien from keeping in his house at the same time above two servants. The 32 Hen. VIII. c. 16. s. 13. remains yet unrepealed. But this law, contrary to good policy and the spirit of commerce, is construed very strictly in favour of aliens<sup>2</sup>. For if an alien occupy a dwelling-house of the yearly value of 10*l.* for forty days, he gains a settlement under the statute 13th and 14th Car. II. c. 12.<sup>3</sup> And Mr. Justice Blackstone in his Commentaries, page 372, says, that an alien may hire a house for his habitation; for this indulgence is necessary for the advancement of trade.

Besides these restrictions, aliens are subject to certain higher duties at the custom-house than subjects are<sup>4</sup>. To which extra duties, by the course of the Exchequer, the son of an alien, though born within the realm, is liable for the first generation<sup>5</sup>. But by 24 Geo. III. st. 2. c. 16. aliens are exonerated from the extra impositions, except from those which have been granted to the city of London.

The description of persons with whom an alien trader may deal, has also been the object of legislative interference.

By 9 Ed. III. st. 1. c. 1. 25 Ed. III. st. 4. c. 2. 2 Ric. II. st. 1. c. 1. and 11 Ric. II. c. 7. all merchants, strangers or denizens, may within this realm buy of and sell to what persons they please, as well foreigners as denizens, except the enemies of the king, all manner of merchandizes, without disturbance, on pain that the person causing such disturbance

<sup>1</sup> 1 Bl. Com. 372.

<sup>2</sup> Co. Lit. 2. b. n. 7.

<sup>3</sup> The King v. Eastbourne, 4 East's Rep. 103.

<sup>4</sup> 1 Bl. Com. 372.

<sup>5</sup> Blake v. John and James Vander Bergh, Hard. 235.

shall forfeit double damages to such merchant stranger as he may disturb.

But by 16 Ric. II. c. 1. and 5 Hen. IV. c. 9. no merchant alien or stranger shall sell any manner of merchandize to any other merchant alien or stranger, except victuals, on pain of forfeiting the same.

The period within which the commercial transactions of merchants strangers may be negotiated has been variously prescribed by the provisions of the statutes of 5 Hen. IV. c. 9. 6 Hen. IV. c. 4. 8 Hen. VI. c. 24. But by the statute 9 Hen. VI. c. 2. it was enacted, that in all transactions between English subjects and alien merchants, payment must be made by such aliens within six months for the merchandizes sold.

The manner and the description of goods in which alien merchants shall invest their capitals for the purposes of commerce have been also prescribed. By 4 Hen. IV. c. 15. enforced by 7 Ed. VI. c. 6. as well as by several other statutes, all merchant strangers shall employ the money received for their merchandizes upon the commodities of this realm, on pain of forfeiting the money arising from the sale of the same. By 4 Ed. IV. c. 8. enforced by 7 Jac. I. c. 14. no stranger shall by himself, or by any other person, buy horns unwrought in London, or within twenty-four miles thereof, or within the fairs of Sturbridge and Ely, unless it be the surplus of such horns as the natives of England cannot employ in their manufactures. By 1 Ric. III. c. 9. to prevent the grievances arising from the monopoly which the merchants of Italy practised with those goods which they brought into this realm, it is provided, that all Italian merchants shall sell their merchandizes in gross, and employ their money in the commodities of this realm. It is also further provided, that they shall sell their wares within eight months after their arrival in this realm. And by the eighth

eighth section of the same act, it is enacted, that all such merchants of Italy shall not buy or sell any wool or woollen cloth within this realm, nor make any woollen cloth, nor deliver wool to that end.

The permission granted by 1 Ric. III. c. 9. to aliens, to import books into this realm, is repealed by the 25th Hen. VIII. c. 15. And by the second section of that statute, every person who shall buy to sell again any such books imported ready bound in boards, leather, or parchment, shall for every such book forfeit six shillings and eight-pence. But by the third section permission is granted to buy the same in gross.

By the statute 11 Edw. III. c. 3. no merchant shall import cloths not made within the king's dominions, on pain of forfeiture of the same.

Nor by statute 3 Edw. IV. c. 4. are any foreign woollen caps, woollen cloths, cards of wool, laces, corses, ribbands, fringes of silk and thread, laces of thread, silk twined and embroidered, laces of gold, of silk and gold, saddles, stirrups, harness to saddles, spurs, bosses of bridles, and irons, grid-irons, locks, hammers, pincers, girdles of iron, latten, steel, tin, or alkmine, fire-tongs, dripping-pans, points, purses, gloves, girdles, harness for girdles, hats, brushes, dice, tennis balls, chess-men, playing cards, any wrought or tawed leather, tawed furs, buskins, shoes, galoches, corks, knives, daggers, wood-knives, sheers for tailors, scissors, razors, sheaths, pins, pattens, pack-needles, forcers, caskets, rings of copper or latten gilt, chafing dishes, hanging candlesticks, chafing bells, sacring bells, curtain rings, ladles, scummers, counterfeit basons, ewers, painted ware, or white wine thread, to be sold within this realm, (unless wrought in Ireland,) on pain of forfeiting the same.

So by 1 Ric. III. c. 12. no merchant stranger shall import to be sold, any girdles, harness for girdles, points, leather,

leather, laces, purses, pouches, pins, gloves, spurs, sheers, shoe-buckles, bells, (except hawks' bells,) curtain rings, knives, hangers, tailors' sheers, scissors, andirons, cobbards, tongs, fire-forks, gridirons. stocklocks, keys, hinges, garnets, painted glasses, painted papers, painted forcers, painted images, painted cloths, beaten gold or silver for painters, saddles, saddle-trees, horse-harness, boots, bits, stirrups, buckles, chains, latten nails with iron shanks, turnets, standing candlesticks, hanging candlesticks, holy-water-stops, chafing dishes, hanging lavers, tin or leaden spoons, latten or iron wire, iron candlesticks, grates, horn for lanthorns; on pain of forfeiting the same.

So by the statute 19 Hen. VII. c. 21. none shall import silk wrought by itself, or with stuff, in ribbands, laces, girdles, corses, calls, or points.

Nor, by the statutes 25 Hen. VIII. c. 9. and 33 Hen. VIII. c. 4. any thing made of tin or pewter.

Nor, by 5 Eliz. c. 7. rapiers, daggers, knives, hilts, pummels, lockets, chapes, handles, scabbards, sheaths for knives.

By the statute 38 Edw. III. st. 1. c. 2. aliens, as well as natives, are prohibited from exporting gold and silver in plate or in money.

And by the 13th and 14th Car. II. c. 13. all persons are prohibited to import any foreign bone-lace, cut work, embroidery, fringe, band-strings, buttons, or needle-work, made of thread or silk, on pain of forfeiting the same and the sum of 100*l.* for every offence; and if sold or offered for sale, to be forfeited in like manner, together with the sum of 50*l.* But the prohibition relating to foreign lace made of thread in the Spanish Low Countries was removed by the statute 5 Ann. c. 17.

By the 33d Geo. III. c. 4. s. 6. no alien shall import any weapons, arms, gun-powder, or ammunition, other than



than as merchandize subject to the laws now in force respecting the importation of arms or ammunition as merchandize, on pain of having the same seized.

By the 37th Hen. VIII. c. 14. s. 4. any stranger, or his factor, conveying or carrying leather from one port to another before the transporting of such leather, shall cause it to be entered and packed in the port from whence he intends to carry the same, taking a certificate expressing the number or quantity of such leather, making mention also in the same certificate whether the customs have been paid or not, on pain of forfeiting the leather or its value.

By 9 Edw. III. st. 1. c. 1. aliens shall carry no wine out of the realm.

Nor, by stat. 33 Hen. VIII. c. 9. s. 9. bows or arrows.

By the tenth section of 1 Ric. III. no persons not born within the king's obeisance, nor made denizens, shall make any cloth within this realm. And by the 11th section of the same statute, all artificers and handicraftsmen not born under the king's obeisance shall not sell or barter their wares or merchandizes by retail, but in gross, on pain of forfeiture of the same.

## CHAPTER II.

### OF THE RESTRAINT OF TRADE.

#### 1. *By Prerogative.*

By the laws of England, the king is considered as the arbiter of commerce. His prerogative extends to the establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging; to the regulation of weights and measures; and to the coinage and denomination of the currency<sup>1</sup>. He may

<sup>1</sup> 1 Blackstone's Commentaries, 271, 275.

constitute fraternities or companies for the management of foreign or domestic trade. But he cannot by his charter make a total restraint of trade, or grant exclusive privileges, for such a patent would be void<sup>1</sup>. Neither can he charge a new impost upon any merchant<sup>2</sup>; nor levy new customs<sup>3</sup>; nor enlarge the ancient customs<sup>4</sup>; for the right of levying these customs belongs to parliament alone.

Neither can he confine the importation of goods to a particular port<sup>5</sup>. But he may, by his grant, require, that all ships which come to such a haven unload in such a place, for the security of the customs<sup>6</sup>. As also that ships load in a public place, and not elsewhere<sup>7</sup>.

We have already seen, that the king may by his license authorize to trade with an enemy's country. But he cannot license the importation of enemy's property, the produce of a foreign country, into this realm in neutral vessels, contrary to the navigation laws<sup>8</sup>.

The king, with the advice of his privy council, may prohibit any particular goods<sup>9</sup>. By statute 1 Jac. c. 25. he may by proclamation restrain the transportation of any grain, generally, or from any particular ports; and by statute 12 Car. II. c. 4. s. 12. and 29 Geo. II. c. 16. the transportation of salt-petre, gunpowder, or any sort of arms or ammunition.

The king may by proclamation lay an embargo upon all shipping in time of war, if for the public good, but not for the private advantage of an individual trader or company<sup>10</sup>.

But these constitutions or edicts of the sovereign, which we call proclamations, are no further binding upon the subject than when they do not contradict the old laws, or tend to

<sup>1</sup> 6 Com. Dig. 50, 361.

<sup>2</sup> 2 Inst. 60.

<sup>3</sup> 1 Rol. Abr. 5.

<sup>7</sup> Rol. 5.

<sup>8</sup> Lord Hale's Tracts.

<sup>2</sup> 2 Inst. 58.

<sup>4</sup> 2 Inst. 60.

<sup>6</sup> Hard. 55.

<sup>8</sup> 12 East's Rep. 296.

<sup>10</sup> 1 Salk. 32.

establish new ones; they only enforce such laws as are already in being, in such manner as the king shall judge necessary <sup>1</sup>.

Where a place for trade is discovered by any persons, the king may grant to them the sole trade there, as in the case of the Greenland Company <sup>2</sup>.

Another of the prerogatives of the king for the regulation of trade, is the right of granting letters of marque and reprisal; words used as synonymous, and signifying, the latter a taking in return, the former the passing of the frontiers in order to such taking. These letters may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found: a custom which, as the elegant commentator observes, seems dictated by nature herself. But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of this principle, it is with us declared by the statute 4 Hen. V. c. 7. that if any subjects of the realm are oppressed in time of truce by any foreigners, the king will grant marque in due form to all that feel themselves grieved. But during war, the Lord High Admiral, or the Commissioners of the Admiralty, are, by various statutes, empowered to grant commissions to merchants and others to fit out privateers or armed ships, upon giving security to the Admiralty to make compensation for any violation of treaties between those powers with whom the nation is at peace: and by 21 Geo. III. c. 47. such armed ships shall not be employed in smuggling. The prizes captured are to be divided according to the contract entered into between the owners and the captain and crew of the privateer <sup>3</sup>.

When a private person sues for letters of marque and

<sup>1</sup> 1 Bl. Com. 271. 12 Co. 75.

<sup>2</sup> 1 Rol. 5.

<sup>3</sup> 1 Bl. Com. 259; and Mr. Christian's note.

reprisal for an injury he has sustained during the time of truce, before he can obtain them, the following requisitions must appear, says Mr. Beawes in his *Lex Mercatoria*, page 214. 1. The oath of the party injured, or other sufficient proof, touching the pretended injury, and the loss or damage thereby sustained. 2. A proof of the due prosecution for obtaining satisfaction in a legal way. 3. A proof of the delay, or the denial of justice. 4. A complaint to his own prince or state. 5. A requisition of justice by him, or them, made to the supreme head or state, where justice in the ordinary course was denied. 6. Persistence still in the denial of justice.

By 43 Geo. III. c. 160. s. 11. every person applying to obtain a commission or letter of marque shall make such application in writing, and therein set forth a particular, true, and exact description of the ship or vessel for which such commission or letter of marque is requested, specifying the name and burthen of such ship or vessel, what sort of built she is, and the number and nature of the guns on board the same, to what place belonging, and the name or names of the owner or owners of such ship or vessel, and the number of men intended to be put on board the same.

Letters of marque may be revoked by the king's express revocation<sup>1</sup>, or by the Admiralty<sup>2</sup>. They may be forfeited for offences against the revenue laws,<sup>3</sup> for acts of cruelty on the part of the captors towards their prisoners<sup>4</sup>. And although there is a clause in the letters patent that no treaty of peace shall prejudice them, yet they may be repealed in Chancery after a peace<sup>5</sup>.

*By By-Law or Custom.*

General restraints of trade are bad ; particular restraints, either as to time or place, are good, if for a sufficient con-

<sup>1</sup> Molloy, vol. i. c. 58.

<sup>2</sup> 43 Geo. III. c. 160. s. 14.

<sup>3</sup> *Ibid.* s. 13.

<sup>4</sup> *The Mariamne*, 5 Rob. Adm. Rep. 9. <sup>5</sup> *The King v. Carew*, 1 Vern. 54.

sideration.

sideration<sup>1</sup>. For a custom which makes a total restraint of trade, as a custom that a man shall not use a trade in such a city, is void, unless it be founded upon some consideration. But a custom which restrains trade *sub modo*, may be good; and therefore the custom of *foreign bought, and foreign sold*, whereby a man not free of a city, &c. will be restrained from buying or selling goods to other foreigners within such city &c. is good<sup>2</sup>.

When the general consent of persons engaged in a trade, has established certain rules for the conduct of that trade, it is not competent for any number of individuals to promulgate a contrary regulation. And though they may agree among themselves to adopt new rules, they cannot thereby deprive one who has not assented to their compact, of the benefit of the old rules, as against themselves; even in a trade recently established<sup>3</sup>.

In the case of *Stone v. Rawlinson*<sup>4</sup>, Willes C. J. said, "The Courts have always in mercantile affairs endeavoured to adapt the rules of law to the course and method of trade and commerce, in order to promote it; and when new cases have arisen on the mercantile law, they consult traders and merchants as to their usage<sup>5</sup>."

Although it is a general rule of law, that a workman is entitled to be paid for his labour where the work is destroyed, without any default of his own, before it is completed or delivered to his employer<sup>6</sup>, yet the law, in this respect, may be controlled by the usage of a particular trade; for custom, as far as it extends, controls the general law<sup>7</sup>.

### By Contract.

Stipulations in general restraint of trade are unlawful and

<sup>1</sup> *London v. Fell*, Willes's Rep. 384.

<sup>2</sup> 6 Com. Dig. 366.

<sup>3</sup> *Fennings and others v. Lord Grenville*, 1 Taunt. 241.

<sup>4</sup> Willes's Rep. 561.

<sup>5</sup> For the particular instances when a by-law or custom is good or not for the restraint of trade, see 6 Com. Dig. 366. 1 Ibid. 152, 155. and 1 Bac. Abr. 338.

<sup>6</sup> *Menetone v. Athames*, 3 Bur. 1592. <sup>7</sup> *Gillett v. Mawman*, 1 Taunt. 137.  
void;



void; and even a promise or obligation which restrains the total use of a trade in a particular place is void, unless it appears to have been made upon good consideration. But if the restraint be qualified, so as only to preclude the party from trading in a particular, or within a certain distance, as for instance ten miles, if a consideration was given, the contract will not be impeached either in law or equity, although the breach of the stipulation tends apparently to the detriment of the party in whose favour it was made<sup>1</sup>.

*By Monopoly.*

All monopolies are contrary to Magna Charta. By statute 38 Edw. III. all merchants may deal freely in all manner of merchandize, notwithstanding any charter to the contrary. And therefore every grant of the king, which tends to a monopoly, will be void by the common law<sup>2</sup>.

So by statute 21 Jac. II. c. 3. all monopolies, and all commissions, grants, licenses, letters patent, &c. to any person, body politic, &c. for the sole buying, selling, making, working, using of any thing, &c. shall be void.

But by a proviso in the same statute, letters patent, &c. heretofore made for twenty-one years or hereafter to be made for fourteen years, for the sole working or making of any new inventions or manufactures, are excepted, provided they be not contrary to law, or mischievous to the state, or generally inconvenient.

Grants to a city or corporation, or to any company &c. for the maintenance or ordering of trade; and letters patent concerning printing, saltpetre, gun-powder, great ordnance, and shot, are also excepted.

*By Statute.*

An enumeration of the restraints that are imposed by statute is to be found under the preceding heads.

<sup>1</sup> 6 Com. Dig. 366. Co. Lit. 206. b. n. 1. 2 Saund. 156. n. J.

<sup>2</sup> 1 Rol. 4.

## CHAPTER III.

## OF THE CHARGE UPON TRADE.

By 27 Geo. III. c. 13. called the Consolidation Act, all the former statutes imposing duties of custom and excise were repealed with regard to the quantum of the duty, and the duties ordered to be paid according to a new book of rates annexed to that statute. Bullion, wool, and some few other commodities, may be imported duty free. All the articles enumerated in the tables or book of rates pay upon importation or exportation the sum therein specified, according to their weight, number, or measure. And all other goods and merchandize, not being particularly enumerated or described, and permitted to be exported and used in Great Britain, shall pay upon importation 27*l.* 10*s.* per cent. ad valorem, or for every 100*l.* of the value thereof, but subject to a drawback of 25*l.* per cent. upon exportation. Very few commodities pay a duty upon exportation; and where the duty is not specified, and the exportation is not prohibited, all articles may be exported without payment of duty, provided they are regularly entered and shipped; but on failure thereof they are subject to a duty of 5*l.* 10*s.* ad valorem. And to prevent fraud in the representation of the value, a very simple and equitable regulation is prescribed by the act, viz. the proprietor shall himself declare the value, and if this should appear not to be a fair and true estimate, the goods may be seized by the proper officer; and four of the commissioners of the customs may direct that the owner shall be paid the price which he himself fixed upon them, with an advance of ten per cent. besides all the duty which he may have paid; and they may then order the goods to be publicly sold, and if they raise any sum beyond what was paid to the owner

and the subsequent expenses, one half of the overplus shall be paid to the officer who made the seizure, and the other half to the public revenue <sup>1</sup>.

Similar provisions are made by 43 Geo. III. c. 68. by which statute the then <sup>2</sup> existing duties of customs and drawbacks, except the duties of package, scavage, bailage, or portorage, payable to the city of London, or other corporations, shall cease, and those specified in the annexed schedule and tables shall be levied, and the drawbacks therein inserted be allowed in their stead.

By the common law, customs are due by the importation, where any act is done by way of merchandize; as bulk broken, part of the goods sold, &c. But where goods are brought into a port not by way of merchandize; as if a ship enters a port by default of provisions, stress of weather, &c., customs are not due until the goods are landed <sup>3</sup>.

By 12 Car. II. s. 3. if any goods be shipped or put into a boat or vessel to the intent to be carried beyond sea, or to be brought from beyond sea into any port, &c. by way of merchandize, and unshipped, &c. the customs due not being paid or tendered to the collector or his deputy, with consent of the comptroller or surveyor there, or one of them, nor agreed for at the custom-house, such goods shall be forfeited. And therefore, where bulk is broken, or that there is a manifest intent to do it, before the customs are paid, tendered, or agreed for, the goods are forfeited <sup>4</sup>. And that even though they are taken by way of reprisal <sup>5</sup>.

If goods and merchandize are brought by a merchant to a port or haven, and there part thereof sold, but never put upon land, they must pay the customs; and discharging out of the ship into another upon the sale, amounts in law

<sup>1</sup> Blackstone's Commentaries, 316. n.

<sup>2</sup> July 5th 1803.

<sup>3</sup> Per Lord Hale, Hardr. 362.

<sup>4</sup> Holton v. Raworth, Hardr. 360.

<sup>5</sup> Leak v. Howel, Cro. Eliz. 534.

to a putting them upon the land, so that if the custom duties are not paid the goods will be forfeited <sup>1</sup>.

But goods wrecked are not forfeited, though the customs are not paid <sup>2</sup>.

If a ship be within the limits of a port, it shall be deemed an importation <sup>3</sup>.

By 12 Car. II. s. 4. if the goods of a subject born be taken upon the sea by enemies or pirates, or lost by shipwreck, and for which the duties had been paid or agreed for; on proof, &c. before the Treasury or Chief Baron, recorded and allowed in the Exchequer, and certified to the officers of the customs, he, his executor or administrator, may ship in the same port so much other goods as those lost amounted to in custom, without paying any duty.

It may perhaps not be inapplicable in this place, to speak briefly of the seizure of goods for which the duties have not been paid.

By 8 Geo. I. c. 18. if any goods are put into any vessel to be carried beyond sea, or to be brought from beyond sea, and unshipped to be landed, the duties not being paid nor agreed for at the custom-house, the same shall be forfeited, one moiety to the king, the other to the seizer, &c. And by subsequent statutes, foreign goods taken in at sea, by any coasting vessel, &c. shall be forfeited, with treble the value thereof.

If goods prohibited from being sold in this country by stat. 11 and 12 W. III. c. 10. are taken out of a warehouse, and put on board of a vessel as if for exportation, but in fact with a view to be relanded, they are liable to be seized, though no attempt has been made to reland them <sup>4</sup>.

Any vessel not above fifty tons, having foreign spirits,

<sup>1</sup> 12 Co. 18.

<sup>2</sup> Leak v. Howel, Cro. Eliz. 534. Sheppard v. Gosnold, Vaugh. 161.

<sup>3</sup> Leaper v. Smith, Bunb. 79.

<sup>4</sup> Wilson v. Saunders, 1 Bos. and Pul. 267.

(except two gallons a head for the crew,) or tea or tobacco, on board, in any harbour, or hovering within two leagues of shore, is forfeited.

Contraband goods, unless they are landed or offered for sale, cannot be seized; the mere bringing of the ship into port gives no right to seize<sup>1</sup>.

## CHAPTER IV.

### OF OFFENCES AGAINST TRADE.

OFFENCES against public trade, according to Mr. Justice Blackstone, are either felonious or not felonious. Of the first sort are,

#### 1. *Owling.*

Owling, so called from its being usually carried on in the night, is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law. But by 28 Geo. III. c. 58. all the former statutes respecting the exportation of sheep and wool are repealed, and an infinite variety of regulations and restrictions upon this staple commodity are consolidated. The principal prohibitions are, that if any person shall send or receive any sheep on board a ship or vessel, to be carried out of the kingdom, the sheep and vessel are both forfeited, and the person so offending shall forfeit 5*l.* for every sheep, and shall suffer solitary imprisonment for three months. But wether sheep, by a license from the collector of the customs, may be taken on board for the use of the ship's company. And every person who shall export out of the kingdom any wool, or woollen articles slightly made up, so as easily to be reduced to wool again, or any fuller's earth, or tobacco-

<sup>1</sup> *Smyth v. Reynolds*, 2 Wils. 257.



pipe clay, and every carrier, ship-owner, commander, mariner, or other person, who shall knowingly assist in exporting, or in attempting to export, these articles, shall forfeit 3s. for every pound weight, or the sum of 50*l.* in the whole, at the election of the prosecutor, and shall also suffer solitary imprisonment for three months. But wool may be carried coastwise upon being duly entered, and security being given, according to the directions of the statute, to the officer of the port from whence the same shall be conveyed. And the owners of sheep which are shorn within five miles of the sea, or within ten miles in Kent and Sussex, cannot remove the wool without giving notice to the officer of the nearest port, as directed by the statute.

## 2. *Smuggling.*

Smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise, is an offence generally connected and carried on hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon the more open, daring, and avowed practices; but the last of them, 19 Geo. II. c. 34. is for the purpose *instar omnium*; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy: enacting, that if three or more persons shall assemble, with fire arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences; or shall pass with such goods in disguise; or shall wound, shoot at, or assault any officers of the revenue when in the execution of their duty; such persons shall be felons without the benefit

nefit of clergy. As to that branch of the statute which required any person charged upon oath as a smuggler, under pain of death, to surrender himself upon proclamation, Sir William Blackstone says, it seems to have expired; as the subsequent statutes, which continue the original act to the present time, do in terms continue only so much of the said act as relates to the punishment of the offenders, and not to the extraordinary method of apprehending or causing them to surrender. But Professor Christian, in his note on the above passage, observes, that the 19th Geo. III. c. 69. s. 23. has expressly declared, that the *method of apprehending* the offenders described in the 19th Geo. II. c. 34. and of *causing them to surrender*, is continued by all the statutes which have continued the 19th Geo. II. c. 34.; and that it is also recited at length in the 24th Geo. III. st. 2. c. 47. and is there directed to be enforced for procuring the apprehension of the capital felons described by that statute, who are persons who shall maliciously shoot into any ship or boat, or at any custom-house officer, or his assistant, in the execution of his duty, either on shore or within four leagues of it.

### 3. *Fraudulent Bankruptcy.*

Another offence against trade is fraudulent bankruptcy, of which we shall treat hereafter. These, continues Mr. Justice Blackstone, are the only felonious offences against trade; the residue being mere misdemeanors: as,

### 4. *Usury.*

Usury is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase.

Whatever were the prejudices of early times against the taking of interest, they appear to have worn off in the reign of Henry the Eighth; a rational commerce having taught the

the nation, that an estate in money, as well as an estate in land, houses, and the like, might be let out to hire, without the breach of one moral or religious duty. And indeed, when the source of this prejudice is examined, it will be found to have originated in a political and not a moral precept; for though the Jews were prohibited from taking usury, that is, interest, from their brethren, they were in express words permitted to take it from a stranger.

In the reign of Henry the Eighth, 10*l.* per cent. was allowed as the legal rate of interest; but this statute was repealed by the 5th and 6th Edw. VI. c. 20., by which all interest was prohibited, the money lent and the interest were declared to be forfeited, and the offender to be subject to fine and imprisonment. And thus the law stood till the statute 13th Eliz. c. 8., which revived the 37th Henry VIII. c. 9., and ordained that all brokers should be guilty of a premunire, who transacted any contracts for more; and that the securities themselves should be void. The statute 21 Jac. I. c. 17. reduced the rate of interest to eight per cent.; and it having been lowered in 1650, during the Usurpation, to six per cent., the same reduction was re-enacted after the Restoration, by statute 12 Car. II. c. 13.; and lastly, the statute 12 Ann. st. 2. c. 16. has reduced it to 5*l.* per cent., which is now the extremity of legal interest that can be taken.

By this statute 12 Ann. c. 16. no person shall take, directly or indirectly, for loan of any money, or any thing, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so proportionably for a greater or less sum; and all bonds, contracts, and assurances made for payment of any principal sum to be lent on usury, above the rate of 5*l.* per cent. shall be utterly void. And whoever shall take, accept, or receive, by way of corrupt bargain, loan, &c. a greater interest, shall forfeit treble the money borrowed;

rowed; one half of the penalty to the prosecutor, the other to the king. And if any scrivener or broker takes more than five shillings per cent. procuration money, or more than twelvence for making a bond, he shall forfeit 20*l.* with costs, and suffer imprisonment for half a year.

These restrictions, however, do not apply to contracts made in foreign countries; for on such contracts the Court will direct the payment of interest according to the law of the country in which such contract was made<sup>1</sup>. Thus Irish, American, Turkish, and Indian interest have been allowed in our courts to the amount of even twelve per cent.; for the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade.

The following determinations will further explain the general principles that govern the cases on this subject.

It is not necessary that money should be actually advanced to constitute the offence of usury; but any contrivance or pretence whatever to gain more than legal interest, where it is the intent of the parties to contract for a loan, will be usury; as where a person applies to a tradesman to lend him money, who, instead of cash, furnishes him with goods, to be paid for at a future day, but at such an exorbitant price as to secure to himself more than legal interest upon the amount of their intrinsic value; this is an usurious contract. The question of usury, or whether a contract is a colour and pretence for an usurious loan, or is a fair and honest transaction, must under all its circumstances be determined by a jury, subject to the correction of the court by a new trial<sup>2</sup>.

<sup>1</sup> *Ekins v. East India Company*, 1 P. Wms. 396. *Ibid.* 2 Bro. Parl. Ca. 72.

<sup>2</sup> *Floyer v. Edwards*, Cowp. 112: *Lowe v. Waller*, Doug. 708. *Tate v. Wellings*, 3 T. R. 531.

It is remarkable, that one species of indirect usury is guarded against by the statute 37 Hen. VIII. c. 9. ; and this part of the statute seems to be still in force. By this it is enacted, that no person shall sell his merchandize to any other, and within three months after buy the same, or any part thereof, for a less price, knowing it to be the same, on pain of forfeiting double the value ; half to the informer, and half to the king ; and also to be punished by fine and imprisonment.

It is now clearly settled, that bankers and other persons discounting bills may not only take five per cent. for interest, but also a reasonable sum besides, for their trouble and risk in remitting cash, and for other incidental expenses<sup>1</sup>. But if a banker deducts the discount of 5*l.* per cent. upon a bill, and, instead of paying the remainder in cash, gives a draft for it, even at a short date, this has been held to be usury ; for he not only gains five per cent., but also the further benefit of the money till that draft is paid<sup>2</sup>. But whether more than 5*l.* per cent. be *intentionally* taken for the loan and forbearance of money, is a question of fact to be decided by a jury. It ought not to be considered usury, if it is done at the request and for the convenience of the party, who might have had cash instead of such bills, and where it is not a device and contrivance to get beyond the fair allowance of interest and expense of commission<sup>3</sup>.

If a person discounts a bill for the drawer upon the terms that he shall receive 5*l.* per cent. discount, and an additional sum for guarantying the payment of the bill by the acceptor, he having no doubt of the acceptor's solvency, this is an usurious contract<sup>4</sup>.

On a contract for a loan reserving 5*l.* per cent. interest,

<sup>1</sup> *Winch v. Fenn*, 2 T. R. 52.

<sup>2</sup> *Parr v. Eliason*, 1 East's Rep. 92.

<sup>3</sup> *Hammett v. Yea*, Bart. 1 Bos. and Pul. 144.

<sup>4</sup> *Lee v. Cass*, 1 Taunt. 511.



if a premium be taken at the time of the loan, the crime of usury is complete as soon as any interest is paid <sup>1</sup>.

If a contract is entered into to pay more than legal interest, though all securities are immediately void, yet the penalty is not incurred till more than legal interest is actually paid <sup>2</sup>. For to subject the party to the penalty under the statute 12 Ann. st. 2. c. 16. there must be both an usurious contract at the time of the loan, and an usurious taking in pursuance of it of money, or money's worth <sup>3</sup>.

But in order to avoid a security, it must be shown that the agreement was in its origin illegal and usurious: it will not be usury if more than legal interest is afterwards paid, if not originally agreed for <sup>4</sup>.

An agreement to replace stock and pay the amount of the dividends, though more than 5*l.* per cent., is not usurious <sup>5</sup>.

Where the principle is secured at all events, except from the insolvency of the borrower, and more than 5*l.* per cent. may be gained by the terms of the contract, as by the profits of some concern, the contract is usurious <sup>6</sup>.

But it is an established rule, that no contract is within the statute of usury, although more than five per cent. is to be paid upon the money advanced, if the principal is actually put in hazard, and may be totally lost to the lender <sup>7</sup>.

And if the original contract be not usurious, nothing done afterwards can make it so; a counterbond to save one harmless against a bond made upon a corrupt agreement, will not be void by the statutes. But if the original agree-

<sup>1</sup> *Wade v. Wilson*, 1 East's Rep. 195.

<sup>2</sup> *Fisher v. Beasley*, Doug. 223.

<sup>3</sup> Per Ashurst J. in *Scott v. Brest*, 2 T. R. 241.

<sup>4</sup> 3 Austr. 910.

<sup>5</sup> *Tate v. Wellings*, 3 T. R. 531.

<sup>6</sup> *Morse v. Wilson*, 4 T. R. 353.

<sup>7</sup> *Ibid.* *Sharpley v. Haniel*, Cro. Jac. 208.

ment be corrupt between all the parties, and so within the statute, no colour will exempt it from the danger of the statutes against usury<sup>1</sup>.

After usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding<sup>2</sup>.

A contract for 6*l.* per cent. made before the statute, is not within the meaning of it; and therefore it is still lawful to receive such interest, in respect of any such contract. The receipt of higher interest than is allowed by the statute, by virtue of an agreement subsequent to the first contract, does not avoid an assurance fairly made<sup>3</sup>. Neither is a bond made to secure a just debt, payable with lawful interest, avoided by a subsequent usurious contract, but the obligee is thereby subject to the penalty, by the latter clause of the statute 18 Car. II, c. 13.<sup>4</sup>

#### 4. *Cheating.*

Cheating, as it was understood at common law, may in general be described to be deceitful practices, in defrauding another of his known right, by means of some artful contrivance, of a nature to affect the public interest, and so subtle and concealed that the common prudence and caution of mankind is not sufficient to elude the effect of it. But there being many species of fraud which could not, in strictness of law, be comprehended within this definition, the statute 33 Hen. VIII. c. 1. enacts, that if any person shall falsely and deceitfully obtain any money or goods, by colour and means of any *false privy token*, or counterfeit letter made in another man's name, &c. for obtaining money

<sup>1</sup> 1 Brownl. 73.    <sup>2</sup> And. 423.    <sup>4</sup> Shep. Abr. 173.

<sup>2</sup> Barnes v. Hedley, 2 Taunt. 184.

<sup>3</sup> 3 Anstr. 910.

<sup>4</sup> Ferrall v. Shaen, 1 Saund. 291.

or goods from such person, he shall suffer punishment by imprisonment, setting upon the pillory, or any corporal pains short of death that the court in its discretion may think proper. But this statute not affecting those frauds to guard against which the common prudence of mankind was thought insufficient, the 20 Geo. II. c. 24. introduces a new offence, and enacts, that all persons who knowingly and designedly *by false pretences*, or by sending threatening letters in order to extort money or goods, shall obtain from any person money, goods, wares, or merchandizes, with intent to cheat or defraud any person of the same, shall be put in the pillory, or publicly whipped, or fined and imprisoned, or transported.

A false assertion or affirmation, without an artful device or contrivance, will not amount to a false pretence; and therefore it has been determined that it is not a false pretence within the statute to purchase goods, and to give a bill for them, drawn upon a banker with whom the drawer has no effects<sup>1</sup>.

But where the defendant had made a bet upon a race to be run upon a future day, by which false representation he obtained a sum of money from the prosecutor to let him have a share of the wager; this was held to be a false pretence within the statute<sup>2</sup>.

So where a man pays a number of workmen, and receives from a clerk what is due to them, if he represents that more is due to them than actually is, he may be indicted for obtaining the difference under a false pretence<sup>3</sup>.

Changing corn by a miller, and returning bad corn in the stead, is punishable by indictment, being an offence against the public<sup>4</sup>. But selling beer short of the measure is not indictable as a cheat<sup>5</sup>. Nor selling gum of one de-

<sup>1</sup> Rex v. Lara, 6 T. R. 565.

<sup>2</sup> Rex v. Young, 3 T. R. 828.

<sup>3</sup> Witchell's case, 2 East's. P. C. c. 18. s. 8.

<sup>4</sup> 1 Sess. Ca. 217.

<sup>5</sup> 1 Wils. 201. 1 Bl. R. 274.

nomination for that of another <sup>1</sup>. Nor selling wrought gold, as and for gold of the true standard; the offender not being a goldsmith <sup>2</sup>.

As there are frauds which may be relieved civilly, and not punished criminally, so there are other frauds which in a special case may not be helped civilly, and yet shall be punished criminally. Thus, if a minor, pretending to be of age, defrauds many persons by taking credit for a considerable quantity of goods; the persons injured cannot recover the value of their goods, but may indict and punish him for a common cheat <sup>3</sup>.

The distinction laid down as proper to be attended to in all cases of this kind, is this:—That in such impositions and deceits, where common prudence may guard persons against their suffering from them, the offence is not indictable; but the party is left to his civil remedy for redress of the injury done him: but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable <sup>4</sup>.

#### *6. Forestalling, Ingrossing, and Regrating.*

Forestalling, ingrossing, and regrating, are offences generally classed together as of the same nature and equally hurtful to the public.

The offence of forestalling the market is an offence against public trade. This is described by 5 and 6 Edw. VI. c. 16. to be the buying or contracting for any cattle, merchandize, or victual coming in the way to the market; or dissuading persons from buying their goods or provisions there; or persuading them to enhance the price when there;

<sup>1</sup> Saver, 205.

<sup>2</sup> *Rex v. Boyer*, Cowp. 323.

<sup>3</sup> Barl. 100.

<sup>4</sup> Per Justice Wilmot, in *Rex v. Wheatly*, 2 Bur. 1129.

any of which practices makes the market dearer to the fair trader. And in *Rex v. Waddington*<sup>1</sup> it was decided, that the following acts amount to the same offence. 1. Spreading rumours with intent to enhance the price of any article. 2. Endeavouring to enhance the price of hops by persuading dealers, &c. not to take their goods to market, and to abstain from selling them for a long time. 3. Ingrossing large quantities of hops, by buying with intent to resell the same for an unreasonable profit, and thereby to enhance the price. 4. Getting into one's hands large quantities of hops by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to resell at an unreasonable profit, and thereby greatly to enhance the price. 5. Unlawfully ingrossing, by buying large quantities, with like intent. 6. Ingrossing hops then growing, by forehand bargains, with like intent.

To forestall any commodity which is become a common victual and necessary of life, or is used as an ingredient in the making or preservation of any victual, though not formerly used and considered as such, is an offence at common law<sup>2</sup>.

Regrating is described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

Ingrossing is also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again. And so the total ingrossing of any other commodity, with intent to sell it at an unreasonable price, is an offence indictable and fineable at the common law.

Several statutes have been made from time to time against

<sup>1</sup> 1 East's Rep. 142.

<sup>2</sup> Ibid.



these offences in general, especially with respect to particular species of goods according to their several circumstances; almost all of which from 5 and 6 Edw. VI. are repealed by 12 Geo. III. c. 71. But these offences still continue punishable upon indictment at the common law by fine and imprisonment.

And at the common law, all endeavours whatsoever to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, or by any other such like devices, are highly criminal, and punishable by fine and imprisonment<sup>1</sup>.

By the common law, a merchant bringing victuals into the realm may sell the same in gross: but no person can lawfully buy within the realm any merchandize in gross, and sell the same in gross again, without being liable to be indicted for the same<sup>2</sup>.

The bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at common law, whether any part thereof be sold by the ingrosser or not<sup>3</sup>.

### 7. *Monopoly.*

Of the remedy and forfeiture provided by the statute 21 Jac. I. c. 3. against monopolies, we have already treated at page 160.

### 8. *Combinations among Victuallers or Artificers.*

Combinations among victuallers or artificers, to raise the price of provisions or any commodities, or the rate of labour, are severely punished by many particular statutes;

<sup>1</sup> 1 Hawk. c. 80.

<sup>2</sup> 3 Inst. 126.

<sup>3</sup> 1 Hawk. c. 80, s. 3.

and in general, by statute 2 and 3 Edw. VI. c. 16. with the forfeiture of 10*l.* or twenty days imprisonment, with an allowance of only bread and water for the first offence ; 20*l.* or the pillory, for the second ; and 40*l.* for the third, or else the pillory, loss of one ear, and perpetual infamy.

Journeymen who, in consequence of a combination, refuse to work till their wages are raised, may be indicted for a conspiracy. And by 29 and 40 Geo. III. c. 106. any two justices of the peace may, upon conviction, punish all journeymen conspiring to raise their wages, by imprisonment in the county gaol for three months, or by imprisonment and hard labour in the house of correction for two months.

But though it is criminal for two or more to combine to raise their wages, yet one journeyman or servant may refuse to work, unless he is paid the wages he demands. For one person alone cannot be guilty of a conspiracy<sup>1</sup>.

#### 9. *Of the Liberty of exercising Trades.*

Of the penalty for exercising a trade in any town without having previously served as an apprentice for seven years, we have already spoken at page 145.

#### 10. *Seducing Artificers and Manufacturers, and exporting prohibited Tools, &c.*

To prevent the destruction of our home manufactures, by transporting and seducing our artists to settle abroad, it is provided by statute 5 Geo. I. c. 27. that such as so entice or seduce them shall be fined 100*l.* and be imprisoned three months ; and for the second offence shall be fined at discretion, and be imprisoned a year : and the artificers so going into foreign countries, and not returning within six months after warning given them by the British ambassador

<sup>1</sup> Rex v. Kinnersley and Moore, 1 Stra. 193.

where they reside, shall be deemed aliens, forfeit all their land and goods, be incapable of any gift or legacy, and be out of the king's protection. By statute 23 Geo. II. c. 13. the seducers incur, for the first offence, a forfeiture of 500*l.* for each artificer contracted with to be sent abroad, and imprisonment for twelve months; and for the second, 1000*l.* and are liable to two years imprisonment. And by the same statute, connected with the 14th Geo. III. c. 71. if any person exports any tools or utensils used in the silk, linen, cotton, or woollen manufactures, (except by 15 Geo. III. c. 5. s. 9. stock cards not exceeding 4*s.* a pair, and spinners' cards not exceeding 1*s.* 6*d.* per pair, intended to be exported to North America,) he forfeits the same and 200*l.*, and the captain of the ship (having knowledge thereof) 100*l.* And if any captain of a king's ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100*l.* and his employment; and is for ever made incapable of bearing any public office: and every person collecting such tools or utensils, in order to export the same, shall, on conviction at the assizes, forfeit such tools, and also 200*l.*

By the statute 21 Geo. III. c. 3. if any person shall put on board any ship, not bound to any place in Great Britain or Ireland, or shall have in his custody, with intent to export, any engine, tool, or implement, used in the linen, cotton, woollen, or silk manufactures, he shall forfeit the same, and also the sum of 200*l.* and shall be imprisoned twelve calendar months, or till the forfeiture is paid. And every captain and custom-house officer, who shall knowingly receive the same, or take an entry of it, shall forfeit 200*l.* Provided that nothing herein shall extend to the preventing of woollen cards or stock cards from being exported to America.

By the 22d Geo. III. c. 60. if any person shall entice

or encourage any artificer employed in printing calicoes, cottons, muslins, or linens, to leave the kingdom, he shall forfeit 500*l.* and be imprisoned one year. And persons who export, or attempt to export, any engines or implements used in that manufacture, shall forfeit 500*l.* Captains of ships and custom-house officers conniving at these offences forfeit 100*l.* and become incapable of holding any office under the crown.

And by the 25th Geo. III. c. 67. any person who entices or encourages an artificer in the iron or steel manufactures to leave the kingdom, shall forfeit 500*l.* and be imprisoned for one year. And captains and custom-house officers conniving at the offence are subject to the same penalty, and become incapable of exercising any public employment.

## CHAPTER V.

### OF MERCANTILE CONTRACTS FOR THE SALE AND PURCHASE OF GOODS.

#### *Of the General Nature of a Contract.*

A CONTRACT, according to Mr. Justice Blackstone, may be defined an agreement (*aggregatio mentium*, the union of two or more minds in a thing done or to be done<sup>1</sup>;) or mutual assent, upon sufficient consideration to do or not to do a particular thing<sup>2</sup>.

This contract or agreement may be either express or implied. Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate, and which therefore the law pre-

<sup>1</sup> Plow. 5. a. 6. a. 1 Com. Dig. 400. Dyer, 336. b.

<sup>2</sup> 2 Blackstone's Commentaries, 442.

sumes that every man undertakes to perform. As if I employ a man to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, viz. that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal<sup>1</sup>.

A contract may also be executed, as if A agrees to change horses with B, and they do it immediately; in which case the possession and right are transferred together. So when an assent subsequent is given to an act precedent, by such assent the agreement is executed<sup>2</sup>. An agreement executory is, when the thing agreed is to be done afterwards; as if A and B agree to change horses next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action<sup>3</sup>.

## SECTION I.

### OF THE PARTIES TO A CONTRACT.

By the law of England, every person *sui juris*, of full age and sane memory, may make a binding contract<sup>4</sup>; and that though the party be a leper, removed by the King's writ a *societate hominum*, or deaf, dumb, or blind, if he have understanding and sound memory<sup>5</sup>.

But the capacity of *femes-covert*, persons insensible or under duress, idiots and lunatics, infants, persons attainted,

<sup>1</sup> 2 Blackstone's Commentaries, 443.

<sup>2</sup> Plow. 8. b.

<sup>3</sup> *Ibid.* 9. a. 2 Blackstone's Commentaries, 443.

<sup>4</sup> Co. Lit. 42. b.

<sup>5</sup> *Ibid.*



and aliens, to contract is limited. In some cases the contracts entered into by such persons are absolutely void ; in others not ipso facto void, but may receive validity from the circumstances we shall immediately mention.

### 1. *Of Contracts by Females-Covert.*

As, by the law of England, the legal existence of the wife is merged in that of the husband, all contracts made with her are, generally speaking, absolutely void<sup>1</sup>. But though a married woman cannot by her contracts create any responsibility on the part of her husband, yet if she acts for him, in any business or department, by his authority and with his assent, he thereby adopts her acts, and must be bound by any admission or acknowledgement made by her respecting that business, in which, by his authority, she acted for him<sup>2</sup>.

So, if the goods for which the wife has contracted come to the use of the husband, or his family, with his knowledge ; as if they be used in his house<sup>3</sup> ; or if the wife be generally allowed by the husband to buy for him ; or buy necessary apparel for herself ; in these cases the consent of the husband is presumed, and he will be liable for such contracts<sup>4</sup> ; for during cohabitation the law will presume the assent of the husband to all contracts made by the wife for necessities suitable to his degree and estate ; and the misconduct or even the adultery of the wife, during that period, will not destroy the presumption.

And if he allows her to assume an appearance which he is unable to support, he will be liable for the consequences ; for he sends her into the world with a credit corresponding to the rank in life in which, by his sanction, she affects.

<sup>1</sup> Perk. s. 154.

<sup>2</sup> *Emerson v. Blonden*, 1 Esp. N. H. P. 142. The Earl of Derby's case, 2 Leon. 42.

<sup>3</sup> 1 Rol. Abr. 350. E. *Manby v. Scott*, 1 Sid. 120.

<sup>4</sup> *Fitz. N. B.* 120. G. 1 Sid. 127.

to be placed<sup>1</sup>. But if they are not cohabiting, then he is in general liable only for such necessities as from his situation in life it is his duty to supply her.

The law is the same if the husband deserts his wife, or turns her away without any reasonable ground, or compels her by ill usage or severity to leave him; for he sends credit with her, and will be liable for all reasonable necessities furnished to her, although he advertises her, and cautions all persons not to trust her, or if he even gives particular notice to individuals not to give her credit<sup>2</sup>.

It seems that, in all cases, general prohibitions against the wife's credit will not exonerate the husband from liability for her contracts<sup>3</sup>.

But if she elopes with an adulterer, or on account of adultery committed under his roof her husband turns her out of doors, the husband's assent to her contracts (even for necessities) after her elopement or expulsion cannot be implied, though the vendor had no notice<sup>4</sup>: and although the husband has been the aggressor, by living in adultery with another woman, and although he turned his wife out of doors when there was not any imputation upon her conduct; yet if she afterwards commit adultery, he is not liable for necessities which may have been furnished to her after that time<sup>5</sup>. So, if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound. But if he absolutely refuse to receive her again, from that time his liability may re-

<sup>1</sup> *Waithman v. Wakefield, Esq.* 1 Camp. N. P. C. 121.

<sup>2</sup> *Boltons v. Prentice*, 2 Stra. 1214, and reported at length in 1 Selw. N. P. 291, from the MSS. of Mr. Ford. *Hodges v. Hodges*, 1 Esp. N. P. C. 441. *Harris v. Morris*, 4 Ibid. 42. *Rawlyns v. Vandyke*, 3 Ibid. 251.

<sup>3</sup> *Rawlyns v. Vandyke*, ut supra.

<sup>4</sup> *Morris v. Martin*, 1 Str. 617. *Ham v. Teovey*, 1 Selw. N. P. 290. *Mainwarring v. Sands*, 1 Str. 706.

<sup>5</sup> *Govier v. Hancock*, 6 T. R. 603.

vive<sup>1</sup>: and even where she has eloped for an adulterous purpose, yet if the husband receives her again, the presumption of law revives, and attaches upon the contracts made by her after the reconciliation<sup>2</sup>.

But though a man is, in general, liable to the contracts of his wife, either for necessities for herself, or the support of his household; yet if he prove an express dissent to such contracts before they were entered into by his wife, no such presumption can arise, and consequently he is not liable on contracts made with her<sup>3</sup>. And such dissent, if expressed to a servant usually employed by the tradesman, is a sufficient dissent to the master<sup>4</sup>. Or if a tradesman has notice of a separate maintenance being allowed to the wife, that, according to Holt C. J. shall be notice of dissent on the part of the husband, and he shall not be charged.

We have seen that a married woman may by her act render her husband chargeable for necessities furnished to her, for he is bound by common right to provide for and maintain her<sup>5</sup>; and if he refuses or neglects so to do, the law has provided a remedy for her by complaint to the ordinary in the Ecclesiastical Court<sup>6</sup>: yet she cannot borrow money to lay out for necessities, and thereby bind her husband<sup>7</sup>. But though the person who lent the money cannot sue the husband on the loan, yet if he can show a proper application of it, as that it was really laid out for necessities, he will in equity be put in the place of him who found and provided such necessities for the wife, and will be thus enabled to come upon her husband<sup>8</sup>.

<sup>1</sup> Per *Ld. Raym.* in *Child v. Hardyman*, 2 Str. 875; and see *Lungworthy v. Hockmore*, 1 *Ld. Raym.* 444. *Etherington v. Parrot*, 1 Salk. 118.

<sup>2</sup> *Harris v. Morris*, 4 Esp. N. P. C. 42.

<sup>3</sup> *Etherington v. Parrot*, 2 *Ld. Raym.* 1006. 1 Salk. 118. *S. C.* *Manby v. Scott*, 1 *Ibid.* 127. 1 Leon. 5. *S. C.*

<sup>4</sup> *Etherington v. Parrot*, 2 *Ld. Raym.* 1006.

<sup>5</sup> Per *Hyde J.* in *Manby v. Scott*, 1 Mod. 128.

<sup>6</sup> *Lit. s.* 78. 3 Atk. 547. 2 *Ibid.* 296. <sup>7</sup> *Earle v. Peale*, 1 Salk. 386.

<sup>8</sup> *Harris v. Lee*, 1 P. Wms. 483.

It was formerly held, that if a feme-covert lived apart from her husband, and had a separate maintenance, she might contract and be sued as a feme-sole<sup>1</sup>, provided such separate maintenance was a fixed and permanent allowance<sup>2</sup>. But by the cases of *Marshall v. Rutton*<sup>3</sup> and *Ewers v. Hutton*<sup>4</sup>, the former authorities are overthrown, and it is finally settled, that a man and his wife cannot by agreement between themselves change their legal capacities and characters, and that a woman cannot be sued as a feme-sole while the relation of marriage subsists, and her husband is in this kingdom, or abroad with an intention of returning, notwithstanding she has a separate maintenance secured to her by deed. Payment however of the wife's debts may be enforced out of such separate fund in a court of equity<sup>5</sup>.

If a man cohabits with a woman, to whom he is not married, and permits her to assume his name, and she appears to the world as his wife, and in that character contracts for necessaries, he will be liable for her contracts, although the creditor is acquainted with her real situation<sup>6</sup>. So, if a man marries a woman, and holds her out to the world as his wife, he does not discharge himself from his liability for necessaries supplied to her, by proving a previous marriage between himself and another woman still alive; unless he brings home a clear knowledge of the first marriage to the person who supplied the necessaries to the second wife<sup>7</sup>.

The husband's responsibility is not confined to the contracts of his wife made during the coverture; it extends, by retrospection, to such debts as she had contracted before

<sup>1</sup> *Todd v. Stokes*, 1 *Ld. Raym.* 444. *Corbett v. Poelnitz*, 1 *T. R.* 5.

<sup>2</sup> *Gilchrist v. Brown*, 4 *Ibid.* 766. <sup>3</sup> 8 *Ibid.* 545.

<sup>4</sup> 3 *Esp. N. P. C.* 255. <sup>5</sup> *Hulme v. Tenant*, 1 *Bro. C. C.* 16.

<sup>6</sup> *Watson v. Threlkeld*, 2 *Esp. N. P. C.* 637.

<sup>7</sup> *Robinson v. Nahon*, 1 *Camp. N. P. C.* 245.

his marriage with her<sup>1</sup>. But if these debts (and if even a bond has been given for them<sup>2</sup>) are not recovered against the husband, during the lifetime of his wife, or that he has been appointed her executor, he cannot be charged for them either at law or in equity after her death<sup>3</sup>.

But the general rule, that a married woman is incapable of binding herself personally, by her contracts, admits of many exceptions. We have seen that, in general, all contracts made by her on the part of her husband, during her cohabitation with him, created his liability on the presumption that she contracted as his agent. But there are circumstances from which she will be considered so far emancipated from the incapacities incident to coverture, and to be *sui juris*, as to be capable of contracting not only for necessities, but for every other thing which can be made the subject matter of agreement, and consequently as being liable to be sued in courts of law, as if she were a *feme-sole*. The cases in which a married woman is regarded as being *sui juris* in regard to matters of property, and personally liable on her own contracts, are, where the situation of her husband incapacitates him from interfering with her concerns, or by local customs.

The cases, when, from the situation of her husband, the disabilities of the wife are suspended or removed, and she is enabled to contract as a *feme-sole*, are when her husband has abjured the realm, or is banished<sup>4</sup>, or is transported for a term of years<sup>5</sup>, or where he does not return after the expiration of the term of his exile<sup>6</sup>.

So, if the husband is an alien, and has deserted this kingdom, leaving his wife behind, she is liable for debts contracted here after such desertion, though she had no

<sup>1</sup> Fitz. N. B. 120. F.

<sup>2</sup> Heard v. Stamford, 3 P. Wms. 409. Ca. Temp. Talbot, 173.

<sup>3</sup> Fitz. 121. C. 41 Co. Lit. 133. <sup>5</sup> Sparrow v. Carruthers cited in 1 T. R. 7.

<sup>6</sup> Carrol v. Bleprow, 4 Esp. N. P. C. 27.



separate maintenance, and had never represented herself as a single woman<sup>1</sup>. So if the husband, being an alien, resides abroad, and the wife trades and obtains credit in this country as a feme-sole, she will be personally liable on her contracts<sup>2</sup>. But there is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner doing so. There is not any case in which the wife has been held liable for her contracts during the residence abroad of her husband, he being an Englishman; the wife not having represented herself as a feme-sole<sup>3</sup>: for he may be presumed to have *animus reverendi*<sup>4</sup>. But that presumption may be rebutted by circumstances which show that he has quitted the country without any intention of returning; in which case the wife would be liable on her contracts<sup>5</sup>.

The case when the wife is liable on her own contract by the local custom of the realm, is where a feme-covert being the wife of a freeman, by the custom of the city of London, trades by herself in a trade with which her husband does not intermeddle; in such case she may sue and be sued on her contracts as a feme-sole; and the husband shall be named only for conformity; and if judgement be given against them, execution shall be against the feme only<sup>6</sup>.

A feme-covert may also by the voluntary agreement of her husband have a separate interest in her husband's trade. Thus, where a husband voluntarily, and after marriage, allowed the wife for her separate use to make profit of all butter, eggs, pigs, poultry, and fruit, beyond

<sup>1</sup> *Walford v. Duchess De Piennes*, 2 Esp. N. P. C. 554. Ibid. 587. 2 Bos. and Pul. N. P. 380.

<sup>2</sup> *De Gaillou v. L'Aigle*, 1 Ibid. 357. <sup>3</sup> *Marsh v. Hutchinson*, 2 Ibid. 226.

<sup>4</sup> *Farrer v. Countess of Granard*, 1 Ibid. 80.

<sup>5</sup> *Marsh v. Hutchinson*, ut supra, and *Boggett v. Frier*, cited in 1 Selw. N. P. 302.

<sup>6</sup> *Langham v. Bewett*, Cro. Car. 68.

what was used in the family; it was decreed that such an agreement was valid, and that the wife had the entire disposal of the profits arising from the same<sup>1</sup>.

*2. Of Contracts by Idiots, Lunatics, Persons insensible, under Duress, or attainted.*

1. The contracts of idiots and lunatics may be avoided either during the continuance of their idiocy or lunacy by the king<sup>2</sup>, or after their restoration to their perfect mind by themselves<sup>3</sup>.

2. Contracts made by persons labouring under the deprivation of the organs of sense, as if they are deaf, dumb, and blind, are ipso facto void<sup>4</sup>.

But contracts entered into during a state of intoxication must be fulfilled. The having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in those circumstances; for this were to encourage drunkenness: but it would be otherwise, if through the management or contrivance of him who gained the deed, &c. the party from whom such deed had been gained was drawn in to drink<sup>5</sup>.

3. If a man, by duress of imprisonment, or by threats, and fear of bodily harm, enter into a contract, it seems that it is voidable<sup>6</sup>; but contracts made under such constraint will remain valid until avoided by the party injured.

4. Contracts for the sale and purchase of goods by persons attainted are absolutely void; for by the conviction all their personal property becomes forfeited to the crown.

<sup>1</sup> *Slanning v. Style*, 3 P. Wms. 335.

<sup>2</sup> *Bract. lib. iii.* 100. *Fitz. N. B.* 232. 4 Co. 126.

<sup>3</sup> *Bul. N. P.* 168.

<sup>4</sup> *Perk. s.* 25.

<sup>5</sup> Per Sir Joseph Jekyl, at the Rolls, *Johnson v. Medlicott*, May 29th, 1734. 3 P. Wms. 130 (A).

<sup>6</sup> 2 *Inst.* 433. 3 *Roll. Abr.* 657.

### 3. Of Contracts by Infants.

In general, all contracts entered into with an infant will not bind him, except for diet, lodging, apparel, physic, and such other necessities; as also for his teaching and instruction<sup>1</sup>.

But though an infant is liable for necessities, yet if he enters into a bond with a penalty for the payment thereof, he will not be liable<sup>2</sup>. However, if he should give a single bond for such necessities<sup>3</sup>, or a bill of exchange or promissory note for their value<sup>4</sup>, he will be bound by it. But he will not be liable as acceptor of a bill of exchange, although the ground of his acceptance should have been for necessities furnished to him<sup>5</sup>. Neither is he liable for money lent to him to purchase necessities, although the money was actually expended in the purchase of necessities<sup>6</sup>. Nor upon an account stated, though all the items in the account are necessities<sup>7</sup>. Nor for goods purchased to trade with<sup>8</sup>, or for work done for him in the course of his trade<sup>9</sup>, although he gains his living by carrying on trade. Neither is instruction in a trade a sufficient consideration to bind an infant<sup>10</sup>.

As to the question, what things shall be deemed necessa-

<sup>1</sup> Co. Lit. 172. *Pickering v. Gunning*, Palm. 528.

<sup>2</sup> *Ayliff v. Archdale*, Cro. Eliz. 920.

<sup>3</sup> *Russel v. Lee*, 1 Lev. 86.

<sup>4</sup> *Ibid.* *Ayliff v. Archdale*, ut supra. *Earle v. Peale*, 10 Mod. 67.

<sup>5</sup> *Williamson v. Watts*, 1 Camp. 562.

<sup>6</sup> *Darby v. Boucher*, 1 Salk. 279. *Probart v. Knouth*, 2 Esp. N. P. C. 472. n.

But under such circumstances the lender would in equity be entitled to restover against the infant; courts of equity holding that in such cases the lender stands in the place of the person furnishing the necessities. *Marlow v. Pitfield*, 1 P. Williams, 558.

<sup>7</sup> *Trueman v. Hurst*, 1 T. R. 40.

<sup>8</sup> *Whittingham v. Hill*, Cro. Jac. 494. *Whywall v. Champion*, 2 Str. 1083.

<sup>9</sup> *Dilk v. Keighley*, 2 Esp. N. P. C. 481.

<sup>10</sup> 1 Keb. 446.

ries, in order to charge an infant, it has been held that such things only as are suitable to his real circumstances, and not with his appearance or station in life, are to be so considered. And therefore where an infant, who was a lieutenant in the army, had been furnished with clothes proper for a man of figure and fortune, they were not held to be necessaries<sup>1</sup>. So, where the defendant, who was one of the gentlemen of the chamber to the Earl of Essex, had been supplied with clothes, part fustian suits, and part velvet and satin suits laced with gold, the Court held that the suits of velvet and satin were not necessary for an infant, although he was a gentleman<sup>2</sup>. So where the infant, an officer in the army, had ordered a livery for his servant, and cockades for some of the soldiers of his company, the cockades were held not to be necessary<sup>3</sup>.

In the case of *Ford v. Fothergill*, Lord Kenyon said, the question of necessaries was a relative fact to be governed by the fortune and circumstances of the infant.

Necessaries for an infant's wife are necessaries for him; but if provided in order to the marriage, he is not chargeable, though she uses them<sup>4</sup>.

Money lent to an infant to procure his liberation from an arrest may come under the description of necessaries; and may be recoverable in assumpsit, if it appears that he was in custody for a debt for necessaries, or in execution<sup>5</sup>.

But though an infant is not liable on his contracts for things which are not necessaries, yet if after he comes of age he expressly promises to pay, the subsequent promise will operate upon the preceding consideration<sup>6</sup>; for he has

<sup>1</sup> *Ford v. Fothergill*, 1 Esp. N. P. C. 211.

<sup>2</sup> *Mackurel v. Bachelor*, Cro. Eliz. 583. <sup>3</sup> *Hands v. Slaney*, 8 T. R. 578.

<sup>4</sup> *Per Pratt C. J.* in *Turner v. Trisby*, 1 Str. 168.

<sup>5</sup> *Clarke v. Leslie*, 5 Esp. N. P. C. 48.

<sup>6</sup> *Southerton v. Whitlock*, 2 Str. 689. *Hilling v. Hastings*, 1 Ld. Raym. 359. *Borthwick v. Carruthers*, 1 T. R. 648. *Cockshott v. Bennett*, 2 Ib. 766.

thereby

thereby ratified the contract; it being a general rule of law, that a moral obligation is a good consideration for an express promise<sup>1</sup>. And though no subsequent promise will revive a void security, yet a security given by an infant, which is voidable on account of his infancy, may be revived by a promise after he comes of age<sup>2</sup>. But to bind an infant on such a subsequent promise, it must be made voluntarily, and with full knowledge that he then stood discharged by law; for if the promise were extorted under the terror of an arrest, or given from an ignorance of the protection which the law afforded, it will not be binding<sup>3</sup>. And in all cases of subsequent promise, if the original transaction was not perfectly fair, equity will give relief, if the infant is immediately on his coming of age entrapped into a ratification of the bargain<sup>4</sup>. By the case of *Thrupp v. Fielder*<sup>5</sup>, it appears, that payment of money generally, on account of a bill which had been given during infancy, will not have the effect of confirming the contract; but that to revive such liability, the promise must have been express on the party's coming of full age.

If the infant, on the attainment of his full age, promises to pay when he is able, the onus probandi of such ability lies on the plaintiff, who, in the absence of other proof, may give evidence of ability, from the defendant's ostensible appearance and circumstances in the world<sup>6</sup>.

The privilege of infancy is personal, and no one can take an advantage of it but the infant himself: it cannot therefore be extended to the other contracting party, however injurious the execution of the contract may be to him<sup>7</sup>.

As an infant is not bound by his contract, if goods are

<sup>1</sup> Per Lord Mansfield in *Watson v. Turner*, Bul. N. P. 147.

<sup>2</sup> Per Ashhurst J. in *Cockshott v. Bennett*, 2 T. R. 766.

<sup>3</sup> *Harmer v. Killing*, 5 Esp. N. P. C. 109. <sup>4</sup> *Brooke v. Gally*, 2 Atk. 35.

<sup>5</sup> 2 Esp. N. P. C. 628.

<sup>6</sup> *Cole v. Saxley*, 3 Ibid. 159.

<sup>7</sup> *Smith v. Bowen*, 1 Mod. 25. *Holt v. Ward Clarendieux*, 3 Str. 937.



delivered to him upon a contract, and with a knowledge of his infancy, they are not recoverable from him in any form of action. But if an infant, without any contract, wilfully take away the goods of another, or upon contract under false pretences, trover lies against him for the tort<sup>1</sup>. But a plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant. Therefore, where the plaintiff declared that at the defendant's request he had delivered a mare to him, to be moderately ridden, and that the defendant, maliciously intending, &c. wrongfully and injuriously rode the mare so that she was damaged, &c.; it was held, that the defendant might plead his infancy in bar, the action being founded on a contract<sup>2</sup>.

While an infant lives with and is properly maintained by his parent, he cannot in any case be liable even for necessities<sup>3</sup>.

But where a father gives his son a reasonable allowance for his expenses, the son is solely liable; the liability of the father in such a case does not exist even for necessities<sup>4</sup>.

#### 4. *Of Contracts by Aliens.*

We have seen that alien friends may by law trade in this country; consequently, they may sue and be sued upon contracts relating to personal property the same as natural-born subjects. But with respect to alien enemies the case is very different. In the law of almost every country<sup>5</sup> the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, an action upon a contract. The peculiar law of our

<sup>1</sup> *Manby v. Scott*, 1 Sid. 129. *Johnson v. Pie*, 1 Lev. 169.

<sup>2</sup> *Jennings v. Rundall*, 8 T. R. 235.

<sup>3</sup> *Bainbridge v. Pickering*, 2 Q. B. Rep. 1325.

<sup>4</sup> *Crantz v. Gill*, 2 Esp. N. P. C. 471.

<sup>5</sup> Per Sir W. Scott, in the *Case of the Hoop*, 1 Rob. Adm. Rep. 200.

country applies this principle with great rigour. The same principle is received in our Courts of the law of nations; they are so far British Courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hâc vice*. But otherwise he is totally *exlex*! Even in the case of ransoms<sup>1</sup> which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; the payment was enforced by an action brought by the imprisoned hostage in the Courts of his own country for the recovery of his freedom. A state in which contracts cannot be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal disability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter 7, where he lays down that the legality of commerce and the mutual courts of justice are inseparable: he says, that cases of commerce are undistinguishable from cases of any other species in this respect. *Si hosti semel permittas actiones exercere, difficile*

<sup>1</sup> By the 33d Geo. III. c. 66. it is enacted, that the ransom or any contract entered into by any of his majesty's subjects for the ransom of any ship or merchandize captured by an enemy is unlawful; and that all contracts and securities for that purpose are absolutely void; and that every person entering into such a contract shall forfeit 500*l*.

est distinguere ex quâ causâ oriantur; nec potui animadvertere illam distinctionem unquam usu fuisse servatam.

But though all trading between subjects of states at war is illegal, as totally inconsistent with the relation at that time subsisting between the two countries; yet by the dispensing power which is vested in the sovereign by most of the states of Europe<sup>1</sup> such an intercourse may be legalized, and by consequence the ability to sustain any contract by an appeal to the tribunals of one country on the part of the subjects of the other. This principle of the law of nations is recognised by the law of England. If a British subject obtains a license to trade, it will so far legalize such trade, as to enable him to maintain an action in our Courts upon any contract arising out of it. Thus, the statute 43 Geo. III. c. 15§. s. 15. having enabled the king, by order in council, to license the importation of certain goods, being British or neutral property, from the enemy's country, in neutral ships, a contract made by A. and B., British subjects, (the plaintiffs,) for the purchase of brandy from a house of trade in France, which was then at war with this country, to be shipped from thence in a neutral, on account of A. and B.; which contract was made in contemplation of obtaining a license for that purpose, and which was accordingly obtained soon after the making of such contract, and before it was begun to be executed; is a legal contract, and may lawfully be guarantied in the first instance by C. and D., other British subjects (the defendants): and after such license obtained, the guarantees are liable in damages for the non-shipment of the goods by the house in France on board a neutral vessel sent thither for that purpose<sup>2</sup>.

<sup>1</sup> Lynk. Quest. J. P. lib. i. c. 3.

<sup>2</sup> *Tinson v. Merac*, 9 East's Rep. 35.

So where a trading with an alien enemy for specie and goods, to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the king's authority, it was held, that an insurance on the enemy's ship, as well as on the goods and specie put on board for the benefit of the British subjects, was incidentally legalized; and that it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue<sup>1</sup>.

But though a trading between belligerent nations is legalized by the king's license, yet it will not have the effect of removing the personal disability of an alien enemy residing in the hostile country, *flagrante bello*, to sue in a British court of justice; and as the right to sue on a contract of sale is a chose in action, no action can be maintained on his behalf by his assignee or trustee<sup>2</sup>.

But if an alien enemy comes into this kingdom with a safe conduct, or by license, or under the king's protection, his disability to sue and be sued upon contracts relating to personal property is removed<sup>3</sup>; and it is not necessary to show an actual license in such case; for, "if an alien enemy comes here in time of war, and continues without disturbance, it shall be intended that he came with a license<sup>4</sup>."

With respect to the contracts made by prisoners of war in this country, it seems from the leaning of the opinions of the Judges in the case of *Sparenburgh v. Bannatyne*, that

<sup>1</sup> *Kensington v. Inglis*, 8 East's Rep. 273.

<sup>2</sup> *Brandon v. Nesbitt*, 6 T. R. 23. *Bristow v. Towers*, *Ibid.* 35.

<sup>3</sup> *Wells v. Williams*, 1 Salk. 46. 1 *Ld. Raym.* 282. S. C. *Usparicha v. Noble*, 13 East's Rep. 332.

<sup>4</sup> 1 *Lutw.* 34, 35. S. C. recognised by Mr. Justice Rooke in *Maria v. Hall*, 1 Taunt. 33, n.; and by Mr. Justice Heath in *Sparenburgh v. Bannatyne*, 1 Bos. and Pul. 171.

prisoners of war on their parole, by the license of the king, may make binding contracts. In that case, Lord Chief Justice Eyre said, "As to the grounds of policy, namely, that a benefit would result to the enemy from the plaintiff recovering; it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and jurisdiction of our courts. Such is the case of an outlaw. Modern civilization has introduced great qualifications to soften the rigours of war, and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the assistance of our courts of justice. It is not therefore good policy to encourage these strict notions, which are insisted on contrary to morality and public convenience."

So from the above cases of *Sparenburgh v. Bannatyne*, and *Maria v. Hall*, it appears, that a prisoner of war, whether an alien enemy or a neutral subject taken in the service of a hostile power, may sue for a remuneration for his personal labour performed for a subject of this country. And this is sanctioned by the authority of Grotius<sup>1</sup> and Puffendorf<sup>2</sup>.

As to the law respecting contracts entered into by partners and agents, see those respective heads.

<sup>1</sup> De Jure B. ac P. lib. iii. c. 21. s. 28.

<sup>2</sup> Lib. viii. c. 7. s. 14.



## SECTION II.

## OF THE SUBJECT MATTER OF A CONTRACT.

All things may legally be the subject matter of a contract if founded on a sufficient consideration, unless the execution of such contract is contrary to public policy, or the principles of morality, or in contravention of the express statutes made for the regulation of particular trades.

Among contracts contrary to public policy, is that of buying and selling the current coin of the realm for more than its denomination. By statutes 5 and 6 Edw. VI. c. 19. it is enacted, that if any person or persons exchange any coined gold, coined silver, or money, giving, receiving, or paying any more in value, benefit, profit, or advantage for it, than the same is or shall be declared by the king's majesty's proclamation to be current within this his highness's realm and other his dominions, that then all the said coined gold, silver, and money so exchanged, and every part and parcel thereof, shall be forfeited, and the parties so offending shall suffer imprisonment by the space of one whole year, and make fine at the king's pleasure.

In the case of the *King v. De Yonge*, 14 East's Rep. 402. it was decided, that to purchase guineas at a higher rate than the current value, in bank of England notes, is not an offence within the meaning of this act.

But by Lord Stanhope's temporary act<sup>1</sup>, to receive or pay for any gold coin current within the realm more than its true and lawful value, whether such value or advantage be paid or taken in lawful money, or in notes or bills of the bank of England, or in silver tokens, or any other means or contrivance whatsoever, is a misdemeanour.

<sup>1</sup> 51 Geo. III. c. 127.

It is also contrary to the policy of our law to give effect to any contract the object of which is to forestall the market, regrade, or ingross the article bought. And therefore, where goods are bought or contracted to be bought with such an intent, the contract is not only illegal and void, but no action is maintainable for the non-performance of it<sup>1</sup>.

The agreement must not be contaminated with, or arise out of, an illegal transaction. And therefore no contract can be given effect to, which originates in an act contrary to the statute 7 Geo. II. c. 8. s. 5. (an act to prevent stock-jobbing,) which enacts, that all contracts to deliver, accept, or refuse any stock or share therein, of which stock or share therein the contracting parties are not actually possessed or entitled to, shall be void, and the persons entering into such contract, and the brokers negotiating the same, subject to a penalty of 500*l*.

On this statute it has been decided, that if A., who was employed as a broker for B. in stock-jobbing transactions, paid the differences for him; but a dispute arising between them respecting the amount of A.'s demand, the matter was referred to C., who awarded 360*l*. to be paid; on which A. drew on B. for 100*l*. part of the above, and indorsed the bill to C. after B. had accepted it; C. could not recover on the bill<sup>2</sup>.

But though payment of the differences, or of a bill given for the differences, cannot be enforced; yet if money is lent for that purpose, it may be recovered notwithstanding the statute 7 Geo. II. - Thus, if two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them pays the

<sup>1</sup> 1 Hawk. P. C. c. 80. Rex v. Waddington, 1 East's Rep. 142, 167.

<sup>2</sup> Steers v. Lashley, 6 T. R. 61.

broker, with the privity and consent of the other, the whole sum, he may recover a moiety from the other in an action for money paid to his use<sup>1</sup>. Neither does the statute extend to invalidate a bond given for reimbursing a compounder of differences, who had paid money for himself and another jointly concerned with him, the sum he had paid on that other person's account<sup>2</sup>.

So no action can be supported on any contract made contrary to the statute 6 Geo. I. c. 18. the twelfth section of which directs, that societies and partnerships (except the two corporations mentioned therein) shall be restrained from underwriting any policy, or making any contract of assurance; and if any person acting in such society or partnership shall presume to underwrite any such policy, or make any contract of assurance, every such policy shall be void, and the sum underwritten shall be forfeited.

And therefore a contract for a marine insurance in which the plaintiff did not alone stand the risk insured, but associated one or more in partnership with him, cannot be enforced<sup>3</sup>. And although one partner in such illegal insurances has paid the whole of the loss, he will not be allowed to recover any part of the premiums from his co-partners<sup>4</sup>.

A contract for the shipment of goods to the East Indies is void by the stat. 7 Geo. I. c. 21., which declares that all contracts and agreements whatsoever made by any of his majesty's subjects for the loan of any money by way of bottomry, "on any ship or ships in the service of foreigners and bound or designed to trade to the East Indies, and all contracts and agreements made by any of his majesty's

<sup>1</sup> *Petrie v. Hannay*, 3 T. R. 418.      <sup>2</sup> *Faikney v. Reynous*, 4 Bur. 2069.

<sup>3</sup> *Sullivan v. Greaves*, *Sittings after E. T.* 1789.

<sup>4</sup> *Booth v. Hodgson*, 6 T. R. 405. *Mitchell v. Cockburn*, 2 Hen. Bl. 379.

subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods, merchandize, &c. shall be void<sup>1</sup>."

Neither can contracts made in violation of the revenue laws be made the subject of complaint in a court of justice. Hence, where an agreement was made between two parties subjects of this country, for the sale and delivery of goods in Guernsey, for the purpose of being smuggled into England, it was held that the vendor could not maintain an action for the value of the goods<sup>2</sup>. And in a subsequent case it was decided, that the circumstance of the vendor being an inhabitant of Guernsey would not vary the case, for he was still an inhabitant of this country<sup>3</sup>.

So where the vendor was concerned in giving assistance to the vendee to smuggle goods, by packing them in the manner most suitable for and with intent to aid that purpose, although the vendor was a foreigner resident abroad, and the sale and delivery of the goods were completed abroad, it was held, that the vendor could not resort to the laws of this country to give effect to his agreement<sup>4</sup>. But the mere knowledge of the vendor that the goods were purchased for the purpose of being smuggled is not sufficient to prevent his recovering in an action for the price of the goods, if the vendor was a foreigner resident abroad, and the sale and delivery were completed abroad<sup>5</sup>.

Contracts in restraint of the general freedom of trade are also contrary to public policy. But an agreement not to use a trade in a particular place is legal<sup>6</sup>. And therefore where a contract was entered into by a practising attorney,

<sup>1</sup> Lightfoot v. Tenant, 1 Bos. and Pul. 551.

<sup>2</sup> Biggs v. Lawrence, 3 T. R. 454.    <sup>3</sup> Clugas v. Panaluma, 4 T. R. 467.

<sup>4</sup> Waymell v. Read, 5 T. R. 599.    <sup>5</sup> Holman v. Johnson, Cowp. 341.

<sup>6</sup> Mitchell v. Reynolds, 1 P. Wms. 181. Broad v. Jollyfe, Cro. Jac. 596.

that he would relinquish and make over to B. and G. two other attorneys, his business as an attorney, as far as respected his practice in the profession within London, and one hundred and fifty miles from thence, and all his business as agent for any attorney, and that he would recommend his clients and permit B. and G. to use his name in the business, has been held valid <sup>1</sup>.

No action can be supported on a contract contrary to the principles of morality; for the law prohibits every thing *contra bonos mores*, and *ex turpi causa non oritur actio*; or, in the elegant paraphrase of Lord Mansfield, justice must be drawn from pure fountains. And therefore the value of prints on obscene and immoral subjects is not recoverable <sup>2</sup>. Neither can a contract for articles of dress <sup>3</sup>, or for board and lodging<sup>4</sup>, if furnished for the purpose of enabling the defendants to carry on the business of prostitution, be enforced. It is to be observed, however, that to relieve the defendant from the obligation of fulfilling the contract on her part, it must appear that the clothes were supplied, and the board and lodging furnished, in furtherance of the defendant's immoral way of life: a mere knowledge of that fact will not produce such an effect<sup>5</sup>; which distinction was also taken by Lord Chief Justice Eyre in *Crisp v. Churchill*, E. 34 Geo. III. cited in *Lloyd v. Johnson*, 1 Bos. and Pul. 340, in which latter case a prostitute was held liable for washing done for her.

It remains to speak of contracts entered into in contravention of statutes made expressly for the regulation of particular trades.

Much of the matter referable to this head having been

<sup>1</sup> *Bunn v. Gay*, 4 East's Rep. 190.

<sup>2</sup> *Fores v. Johnes, Esq.* 4 Esp. N. P. C. 97.

<sup>3</sup> *Bowry v. Bennet*, spinster, 1 Camp. N. P. C. 348.

<sup>4</sup> *Girardy v. Richardson*, 1 Esp. N. P. C. 13. *Howard v. Hodges*, cited in 1 Selw. N. P. 79.

<sup>5</sup> Per Lord Ellenborough in *Bowry v. Bennet*.



necessarily treated of in other parts of this work, little remains to be enlarged upon here. It remains merely to observe, that whenever the sale or manufacture of any article is prohibited by any statute, except in the manner prescribed, no action can be maintained upon any contract for the sale of such article, unless the requisites of the statute have been complied with: and therefore if such article has been delivered to the vendee, it cannot be recovered from him in any form of action: it is a mere gift <sup>1</sup>.

But if a sale has been made in breach of an act of parliament, containing mere revenue regulations, which are protected by a specific penalty, and there being no clause in the act making the contract of sale illegal, such sale is valid. And therefore an omission to take out a license for liberty to deal in exciseable goods will be no objection to an action for the recovery of the price agreed for on the sale of them <sup>2</sup>.

We shall close this division of our subject with a brief exposition of fraudulent contracts.

The agreement must be fair and honest, and not entered into for a fraudulent purpose; for no action can be maintained for the breach of a fraudulent contract. Thus, if all the creditors of an insolvent debtor consent to accept a composition for their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtains from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be given; the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action <sup>3</sup>.

The same principle was established in *Jackson v. Lo-*

<sup>1</sup> *Law v. Hodgson*, 11 East's Rep. 300.

<sup>2</sup> *Johnson v. Hudson*, Ibid. 182.

<sup>3</sup> *Cockshott v. Bennet*, 2 T. R. 763.

mas<sup>1</sup>; in which case an insolvent had assigned over his effects for the benefit of his creditors, and in the deed there was a proviso that the shares of those creditors who did not execute it before a given day should be paid to the insolvent; it was held that an agreement made between the insolvent and a creditor after that day, that the latter should sign the deed, and the former pay the remainder of the whole debt, was fraudulent and void.

So where A. having given B. a sum of money for goods in advancement of C., a secret agreement between B. and C., that C. should pay B. a further sum for the goods, was held to be void, on the ground that it was a fraud upon A.<sup>2</sup>

So where a trust deed was proposed to the creditors of an insolvent, whereby they all engaged to accept payment of their debts by six instalments, the first four of which were guarantied by collateral security, the two last to remain upon the single security of the insolvent; but several of the creditors refusing to sign unless the plaintiffs did, the plaintiffs stipulated privately with the insolvent, as the condition of their signature, that he should procure them collateral security for the two last instalments as well as the two prior ones; and upon the faith of such private agreement the plaintiffs signed the trust deed, which the other creditors did also, but without a knowledge of the private agreement: such private agreement was held to be a fraud against the other creditors, and void, although the effect of it was not to secure to the plaintiffs the payment of more money than the other creditors were to receive, but only further security for the same sum<sup>3</sup>.

<sup>1</sup> 4 T. R. 166.

<sup>2</sup> Jackson v. Duchaire, 3 Ibid. 551.

<sup>3</sup> Leicester v. Rose, 4 East's Rep. 371.

## SECTION III.

## OF THE ASSENT TO OR ACCEPTANCE OF A CONTRACT.

In contracts or bargains for the sale and purchase of goods, where the contract or bargain is not to be presently executed by a simultaneous or consecutive payment or delivery to fix the contract, and transmute the property, the assent of the contracting parties is regulated by the statute of frauds<sup>1</sup>. Before this statute, a bargain for the sale and purchase of goods at a future stipulated time, provided there was a quid pro quo, or that motive or consideration which our law requires to raise an actionable demand upon any contract, was unrestricted in distance of time, and not necessary to be accompanied and ascertained by those acts of payment, or delivery of part, or the whole, of the thing contracted for, which, in contracts or bargains to be presently executed, were necessary to their obligation and completion, and to the legal alteration of property in the subject of the contracting parties<sup>2</sup>.

We shall consider the nature of an assent to a contract in a threefold point of view:—1. for the sale of goods in possession; 2. for the sale of goods not in possession; and 3. for the sale of goods on condition, or on sale and return.

1. *For the Sale of Goods not in Possession.*

By the common law, upon all sales of goods the property was immediately vested in the vendee upon the making of the contract, although the actual possession was not obtained by him until the fulfilment of the stipulated terms. But by the statute of frauds<sup>3</sup> it is enacted, “That no contract for the sale of any goods, wares, or merchandizes to the price of ten pounds and upwards, shall be good, except the buyer

<sup>1</sup> 29 Car. II. c. 3.<sup>2</sup> Roberts on Frauds, 165.<sup>3</sup> 29 Car. II. c. 3. s. 17.

shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum, in writing, of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." And by the fourth section of the same statute all executory contracts which are not performed within one year from the making, whether for the sale of goods (whatever may be the value), or the doing of any other act, must be in writing; it being enacted, "That no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

In the exposition of the seventeenth clause of this statute, it has been determined, that executory contracts, that is, where the goods contracted for are to be delivered at a future time, are within the statute, as well as such as are to be completed immediately; and consequently if the requisites of the statutes have not been complied with, viz. neither earnest, delivery of a part of the goods, nor agreement in writing, such contracts are void<sup>1</sup>.

The fourth clause of the statute is confined to those cases where it clearly appears from the tenor of the agreement to have been the understanding of the parties, that the contract was not to be completed within a year from the time of making it<sup>2</sup>; but it does not extend to such contracts as depend upon a contingency, and which by possibility, and

<sup>1</sup> *Rondeau v. Wyatt*, 2 Hen. Bl. 63. *Alexander v. Comber*, 1 Ibid. 20. *Cooper v. Elston*, 7 T. R. 14.

<sup>2</sup> 11 East, 142.

in the contemplation of the parties, may be performed within the year, though the contingency on which they depend does not, in fact, happen within that time; for “a contingency is not within the intent of the statute, nor any case which depends upon a contingency. It does not extend to cases where the thing only may be performed within the year<sup>1</sup>.”

So, if the subject of the contract is not in esse, and capable of an immediate delivery at the time of contracting; as where the contract was for a chariot to be made<sup>2</sup>, or for corn to be threshed<sup>3</sup>, or for a waggon to be made<sup>4</sup>; or for a barge to be built<sup>5</sup>; or for a crop of grass, which at the time of the bargain for the sale of it was unsevered<sup>6</sup>; such contracts are not within the statute, and therefore will be valid, notwithstanding its requisites have not been complied with. And in these cases no property vests in the vendee until the thing contracted for acquire the character in which it is to be delivered, and that although the whole price has been paid in advance<sup>7</sup>. But as soon as the thing contracted for is complete and ready for delivery, the vendee is entitled, on tender of the price, to the goods, and the vendor, to the price, on tender of the goods<sup>8</sup>.

But if it appears to have been the understanding of the parties contracting, that the contract was not to be completed within a year, though it might and was in fact part performed within that time, it is within the statute, and if not in writing, &c. cannot be enforced<sup>9</sup>.

The next consideration is what may be considered a sufficient acceptance within the statute.

<sup>1</sup> Per Dennison J. in *Fenton v. Emblers*, 3 Bur. 1281.

<sup>2</sup> *Towers v. Sir John Osborne*, 1 Str. 506.

<sup>3</sup> *Clayton v. Andrews*, 4 Bur. 2001.

<sup>4</sup> *Dunmore v. Taylor*, Peake's N. P. C. 41.

<sup>5</sup> *Mucklow v. Mangles*, 1 Taunt. 318.

<sup>6</sup> *Crosby v. Wordsworth*, 6 East's Rep. 602.

<sup>7</sup> *Mucklow v. Mangles*, 1 Taunt. 318.

<sup>8</sup> 1 Str. 506. *Noy's Max. c. 42.*

<sup>9</sup> *Boydell v. Drummond*, 11 East's Rep. 142.



Where the goods are ponderous and incapable of an actual delivery, it may be done by something that is tantamount: a symbolical delivery, as of the key of the warehouse in which the goods are lodged, or other indicia of the property, will satisfy the statute<sup>1</sup>.

So also a constructive delivery may arise from words, as where the vendee desires the vendor to keep the goods bargained for in his possession for an especial purpose, and the vendor accepts the order; this is a sufficient delivery within the statute<sup>2</sup>.

A written order given by the seller of goods to the buyer, directing the person (*viz.* the wharfinger or warehouseman) in whose custody the goods are, to deliver them to the vendee, is a sufficient delivery within the statute<sup>3</sup>: and that whether a transfer is made into the name of the purchaser in the wharfinger or warehouseman's books or not<sup>4</sup>.

So it seems, that if the goods bargained for remain in the hands of the vendor, the acceptance of warehouse-rent for them after the period when they ought to have been taken away, according to the terms of the sale, amounts to a complete transfer of them to the purchaser, and consequently a delivery within the statute<sup>5</sup>.

It has also been decided, that while the goods remain in the custody of the vendor, if the purchaser, with the knowledge and approbation of the vendor, exercises any act of ownership over them, as by a resale to a third person, it will amount to a delivery and acceptance within the statute<sup>6</sup>.

So if a purchaser write his name or initials on the goods

<sup>1</sup> *Chaplin v. Rogers*, 1 East's Rep. 192.

<sup>2</sup> *Elmore v. Stone*, 1 Taunt. 458.

<sup>3</sup> *Serle v. Keeves*, 2 Esp. N. P. C. 593.

<sup>4</sup> *Harman v. Anderson*, 2 Camp. N. P. C. 245.

<sup>5</sup> *Hurry v. Mangles*, 1 Ibid. 452.

<sup>6</sup> *Chaplin v. Rogers*, 1 East's Rep. 192.

bargained for, or the same be done by his order<sup>1</sup>; or if he accepts and actually receives a sample which is absolutely part of the commodity sold<sup>2</sup>; or if the goods be weighed for the purpose of delivery, though put into another vessel than that which the vendee desired<sup>3</sup>; such conduct will be a sufficient delivery and acceptance to satisfy the statute.

But to constitute an acceptance within the statute, such acceptance must have been made in affirmance, and with a view to the performance, of the contract; and therefore, if, on examination, the goods, being found to be inferior in quality to those ordered, are returned to the vendor, it will not amount to a sufficient acceptance by the vendee so as to render him liable for their value<sup>4</sup>.

As to what shall be deemed sufficient earnest to bind the bargain, Mr. Justice Blackstone says, "that if any part of the price is paid, if it is but a penny, or any portion of the goods delivered, the property is bound<sup>5</sup>." From the wording of the statute, however, which speaks of a partial delivery of the goods, or the giving of *something* in earnest, or in part of payment, it does not appear absolutely that the earnest must consist of money: the deposit of a ring, a glove, or any other article, would, it should seem, equally satisfy the statute.

The third requisite enjoined by the statute, in order to render valid a contract for the sale of goods above the value of ten pounds, and for which immediate payment has not been made, is, "that a sufficient note or memorandum in writing of the bargain must be signed by the party sought to be charged by the contract, or by his agent thereunto lawfully authorized."

<sup>1</sup> Hodson v. Le Bret, 1 Camp. N. P. C. 233. Anderson v. Scott, *ibid.* 235.

<sup>2</sup> Hinde v. Whitehouse and Galan, 7 East's Rep. 558. Klinitz v. Surry,

<sup>5</sup> Esp. N. P. C. 267.

<sup>3</sup> 1 Bl. Rep. 600.

<sup>4</sup> Kent v. Huskinson, 3 Bos. and Pul. 223.

<sup>5</sup> 2 Bl. Com. 447.

But though the signature of the party to be charged, or of his agent, is required by the statute, and that otherwise the bargain will be void ; yet it has been held, that the signature of the party seeking the benefit of such a contract is not necessary <sup>1</sup>.

The names, however, of both the contracting parties must appear (the name of the purchaser as well as that of the seller) either on the face of the memorandum, or in something which is thereby referred to, or connected with it by legal reference. And therefore, where a note was made by the plaintiff's clerk in a common memorandum book, specifying the quantity of the commodity purchased, the price, and time of delivery, and in which note the commodity was stated to be bought of the vendor, without saying by whom ; it was held, that the vendee was not entitled to the benefit of his contract <sup>2</sup>.

As to what is a sufficient writing with'in the intent of the statute, it seems, that the writing or printing (as the delivery of an invoice or a printed bill of parcels) of the party's name, on any part of the memorandum of the contract, will be considered as a signature <sup>3</sup>. So if an agreement is drawn up in the party's own hand-writing, beginning "*I A. B. agree,*" and a place is left at the bottom for a signature, but which is never signed, it may be considered as a note or memorandum within the statute <sup>4</sup>. The initials of the party also are considered as a sufficient signature to satisfy the statute <sup>5</sup>.

A letter containing the terms of an agreement, or which upon the face of it refers to any other writing which does, amounts to a sufficient memorandum, or note in writing,

<sup>1</sup> *Egerton v. Matthews*, 6 East's Rep. 306.

<sup>2</sup> *Champion v. Plummer*, 5 Esp. N. P. C. 240.

<sup>3</sup> *Saunders v. Jackson*, 2 Bos. and Pul. 233.

<sup>4</sup> *Knight v. Cockford*, 1 Esp. N. P. C. 190.

<sup>5</sup> *Phillimore v. Barry*, 1 Camp. N. P. C. 513.

within the meaning of the statute<sup>1</sup>. For, if a letter contains all the terms, and describes the consideration, and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, that letter, which not only is not a signature, but is the last of all things that can be called signing the agreement, is a writing signed, which ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute<sup>2</sup>.

So a subscription as a witness only, by a party who is a principal in the agreement, is a sufficient signing within the statute, and will bind him<sup>3</sup>.

Also, if a person sufficiently authorised as agent to sign an agreement, sign it as a witness, it is sufficient<sup>4</sup>.

Sealing an agreement, without signing it, has been held to be a signing within the statute, if done in the presence of a witness<sup>5</sup>.

So from the cases of *Harrison v. Harrison*, 8 Ves. Jun. 185. and *Addy v. Grix*, *Ibid.* 504. it appears that signing by a mark is a sufficient signature.

We come now to inquire who is an agent of the party to be charged for the purposes of this act.

With respect to the sales of goods by public auction, it has been held, that the auctioneer is an agent for the buyer as well as the seller, and that a memorandum made by him of the bargain will bind both parties<sup>6</sup>. But in order to clothe the auctioneer with this character, the catalogue must contain a memorandum of the terms of the contract. And therefore, where an auctioneer, having previously distri-

<sup>1</sup> *Moor v. Hart*, 2 Chan. Rep. 147. *Hedgson v. Hutchinson*, 5 Vin. 522. *Coleman v. Upcott*, 5 Vin. 527. *Saunderson v. Jackson*, 2 Bos. and Pul. 233.

<sup>2</sup> Per Lord Eldon in *Coles v. Trecothick*, 9 Ves. Jun. 234.

<sup>3</sup> *Welford v. Beazeley*, 1 Ves. 6.

<sup>4</sup> *Coles v. Trecothick*, *ut ante*.

<sup>5</sup> *Lemayne v. Stanley*, 3 Lev. 1.

<sup>6</sup> *Simon v. Metivier*, 1 Bl. Rep. 599. *Emmerson v. Heelis*, 2 Taunt. 33.

buted printed catalogues of sale, at the time of the sale read from a written paper the conditions on which the goods enumerated in the catalogue were to be sold ; it was held, that the writing of the purchaser's name in such catalogue by the auctioneer, against the lot purchased, would not bind the purchaser, the two papers being neither externally annexed nor containing any internal reference to each other<sup>1</sup>.

So where a broker is authorised by one man to sell goods, and to buy such goods for another, an entry in his books of a sale of these goods from one to the other, signed by him, is a binding contract between the parties, without any bought and sold note being sent to them ; for the sending of such note is not for their approbation, but only to inform them of the terms of the contract<sup>2</sup>.

But a memorandum of the sale of goods cannot be signed by one of the contracting parties, as the authorised agent of the other : the agent must be a third person<sup>3</sup>.

As to the manner of appointing such agent, it has been repeatedly decided, that a parol appointment is sufficient<sup>4</sup>; and that the authority need not be given for a particular purpose : a general authority is sufficient.

And such authority may be countermanded at any time before a memorandum of the contract of sale is written and signed by the broker ; although he has previously entered into a verbal agreement to sell the goods<sup>5</sup>.

A power to contract does not seem to come within the scope of the general authority of a mercantile clerk or agent, unless specially authorised for that purpose.

We have seen, that at common law, upon all sales of goods, the property was immediately vested in the vendee

<sup>1</sup> *Hinde v. Whitehouse*, 7 East's Rep. 558; and see *Boydell v. Drummond*, 11 *Ibid.* 142.

<sup>2</sup> *Heyman v. Neale*, 2 Camp. N. P. C. 337.

<sup>3</sup> *Wright v. Dannah*, *Ibid.* 202.

<sup>4</sup> *Chapman v. Partridge*, 5 Esp. N. P. C. 256.

<sup>5</sup> *Farmer v. Robinson*, 2 Camp. N. P. C. 339.



upon the making of the contract: where the requisitions of the contract have been complied with, the effect is similar, the property is changed, and absolutely vests in the vendee from the time of the sale, and remains at his risk, although no actual change of possession should have taken place. And therefore, whatever damage may happen to the goods while in the vendor's possession, the loss will fall upon the purchaser<sup>1</sup>.

But this is to be understood only where no act remains to be done on the part of the vendor; for where any act of the seller, such as counting, weighing, filling up, &c. remains to be done for the purpose of ascertaining the exact quantity sold, the property in the goods does not vest absolutely in the vendee, before the counting, weighing, &c. which was to precede the delivery, and to ascertain the price; but, till such act is done, remains at the risk of the vendor<sup>2</sup>.

Thus, where a sale note for the purchase of fifty tuns of Greenland oil was delivered by the seller's broker to the purchasers, to be paid for by their acceptance, payable at a future day; and they afterwards received from the sellers an order from their wharfingers for the delivery of the fifty out of ninety tuns of their oil; yet as the custom of the trade was for the casks to be searched by the sellers' cooper, and for a broker on behalf of both parties to ascertain the foot dirt and water in each, (for which allowance was to be made) and then the casks were to be filled up by the sellers' cooper at their expense; all which was to precede the delivery to the buyer: it was held that the sale was not complete to pass the property, but that the sellers, on the insolvency and subsequent bankruptcy of the buyers, before such acts done and delivery made, might countermand it<sup>3</sup>.

<sup>1</sup> *Phillimore v. Barry*, 1 Camp. N. P. C. 573.

<sup>2</sup> *Hanson v. Meyer*, 6 East's Rep. 614. *Rugg v. Minett*, 11 Ibid. 210. *Zagury v. Furnell*, 2 Camp. N. P. C. 240.

<sup>3</sup> *Wallace v. Breeds*, 13 East's Rep. 522.

But although some act remains to be done between the vendor and the persons who retain the custody of the goods, for the purpose of ascertaining either the quantity or the price; yet if no such act remains to be done between the vendor and vendee to perfect the sale, the sale is complete. Therefore where A., having forty tuns of oil in a cistern, sold ten tuns to B. and received the price, and B. sold the same to C. and took his acceptance for the same at four months, and gave him a written order on A. for delivery, who wrote and signed his acceptance upon the said order; but no actual delivery was made of the ten tuns, which continued mixed with the rest in A.'s cistern; it was held to be a complete sale and delivery in law of the ten tuns by B. to C.; nothing remaining to be done on the part of the seller, though, as between him and A., it remained to be measured off<sup>1</sup>.

## 2. For the Sale of Goods not in Possession.

Among mercantile men it is usual to contract for the sale of goods which they have reason to expect will be consigned to them by their correspondents abroad. And in this case the contract is complete, though the execution of it is suspended.

Thus, if a contract is entered into for the sale of goods by a particular ship *on arrival*, it means on the arrival of the goods which the ship is expected to bring; and if the ship arrives empty, without any default upon the part of the vendor, he is not liable to the purchaser for the non-delivery of the goods<sup>2</sup>.

So, if the vendor contract for the sale of all the goods which his agents abroad may send by certain vessels, yet he will not be answerable to the vendee for more than has been actually shipped on his account. Thus, A. sold to

<sup>1</sup> Whitehouse v. Frost, 12 East's Rep. 614.

<sup>2</sup> Boyd v. Siffin, 2 Camp. N. P. C. 327.

B. all the hemp that might be shipped on board certain vessels at Riga, not exceeding three hundred tons, by C. the agent of the concern. C. shipped on board these vessels only seventy-one tons of hemp on account of A.; but upwards of three hundred tons on account of other persons. Held; that the contract must be confined to such hemp as C. should ship as agent to A.; and that A. was not answerable to B. for more than seventy-one tons<sup>1</sup>.

But in contracts of this kind, if the vendor absolutely engages that the goods agreed to be sold shall actually be shipped, and the shipment is prevented by the seizure and condemnation of them as enemy's property, he will be obliged to make good the contract<sup>2</sup>.

### *3. For the Sale of Goods on Condition, or on Sale and Return.*

If goods are sold for such a price as A. shall name, when A. shall have fixed the price, the contract is complete; and if the vendor sells the goods between the time of the contract and the ascertainment of the price, an action on the case lies against him<sup>3</sup>. But if the contract becomes impossible by the act of God, or of the person who was to name the price, as by his death, refusal, or the like, the contract is absolutely void<sup>4</sup>.

Where goods are sold upon sale or return, no property in such goods vests in the conditional vendee, until the completion of the condition of the resale. But though, whilst the goods remain unsold in the hands of such conditional vendee, no absolute property vests in him; yet, under the statute 21 Jac. I. c. 19. s. 11. they will pass by assignment under a commission of bankruptcy against him, as goods in his possession, order, and disposition<sup>5</sup>.

If goods be sold to a trader, with a proviso, that in case

<sup>1</sup> Hayward v. Scougall, 2 Camp. N. P. C. 56.

<sup>2</sup> Splidt v. Heath and others, Guildhall Sitt. March 7th, 1809, 2 Camp. N. P. C. 57. n.

<sup>3</sup> Kit. 181.

<sup>4</sup> Co. Lit. 206. b.

<sup>5</sup> Livesay v. Hood, 2 Camp. N. P. C. 83.

of bankruptcy the vendor may retake them, such a condition is void under the statute 21 Jac. I. c. 18. s. 11. if the goods remain under the control and disposition of the bankrupt<sup>1</sup>; for the statute enacts, “that if any persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietors, have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon themselves the sale, alteration, or disposition as owners; that in any such case the commissioners, or the greater part of them, shall have power to sell and dispose of the same, to and for the benefit of the creditors who shall seek relief by the commission, as fully as any other part of the estate of the bankrupt.”

#### SECTION IV.

##### OF THE TIME WHEN A CONTRACT MAY BE MADE.

By the statute 29 Car. II. c. 7. s. 1. it is enacted, that no person or persons whatever shall publicly cry, show forth, or expose to sale, any wares, merchandizes, goods, or chattels whatsoever, upon the Lord's day. But it has been held, that a sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor, or his agent, is neither void at common law nor by the statute. Thus, where it appeared that the plaintiff, who was a banker by trade, had sent his horse to one Hull, who kept a commission stable for the sale of horses by auction, for the purpose of being sold; and that the defendant came on a Sunday to the stable, and, after having tried the horse, requested that he might carry it to show to a Major Mackensie, that he might try it. Hull told him that the price of the horse at the hammer was a hundred guineas, but if the defendant would bring him back 100*l.* it would suffice. That he must either bring 100*l.* or return the horse by two

<sup>1</sup> *Holroyd v. Gwynne*, 2 Taunt. 176.

o'clock at the furthest ; and that if the defendant did not return it by two o'clock, the horse should be his own. The horse not being brought back till eight o'clock, Hull refused to receive it, and insisted that the sale was complete at two o'clock. To bring this case within the act, said Sir James Mansfield, we must pronounce that either Drury or Hull worked within their ordinary callings on the Sunday. But the sale of horses by private contract was not Drury's ordinary calling, nor was it Hull's ; his calling was that of a horse-auctioneer, and he was not within his ordinary calling in selling this horse by private contract ; and therefore, although it is to be lamented, the sale must be held good <sup>1</sup>.

## SECTION V.

### OF THE PLACE WHERE A CONTRACT MAY BE MADE.

As property may in some cases be transferred by sale, though the vendor has none at all in the goods, it is expedient that sufficient notoriety should attend such sale as to secure the purchaser of his purchase. The general rule of law is, that all sales and contracts of any thing vendible, in fairs or markets overt, (that is open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein <sup>2</sup>. And for this purpose, the *Mirroure* <sup>3</sup> informs us, tolls were established in markets, viz. to testify the making of contracts ; for every private contract was discountenanced by law : inasmuch that our Saxon ancestors prohibited the sale of any thing above the value of twenty-pence, unless in open market ; and directed every bargain and sale to be contracted in the presence of credible witnesses <sup>4</sup>. Market overt in the country is held only on special days, provided for particular towns by charter or prescription ; but in London every

<sup>1</sup> Drury v. Defontaine, 1 Taunt. 135.

<sup>2</sup> 2 Inst. 713.

<sup>3</sup> Cap. 1. s. 3.

<sup>4</sup> LL. Ethels. 10, 11. Wilk. 80.



day, except Sunday, is market-day<sup>1</sup>. The market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market-place; but in London every shop in which goods are exposed publicly to sale is market overt, for such things only as the owner professes to trade in<sup>2</sup>. And therefore, if goods are stolen and sold openly in a scrivener's shop on the market-day, the property is not changed by the sale; for a scrivener's shop is not a market overt for plate; *et sic de similibus*<sup>3</sup>. Neither, had the sale been in the shop of a goldsmith, would it change the property, if it had been either behind a hanging, or in any secret manner, so that any that stood or passed by could not see it<sup>4</sup>. So, if the sale be not in the shop, but in the warehouse, or other place of the house, or where the windows of the shop are shut, the property will not be changed<sup>5</sup>. Neither is property changed which has been sold to a *bonâ fide* purchaser, at a wharf where goods of the same sort are usually sold, if the sale has been without the authority of the owner of the goods<sup>6</sup>. And, even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him; though it binds infants, *femes covert*, idiots, and lunatics, and men beyond sea or in prison<sup>7</sup>. So likewise, if the buyer knows that the seller has no right; or there be any fraud in the transaction; or he knows the seller to be an infant, or *feme covert* not usually trading for herself<sup>8</sup>; the owner's property is not bound thereby. Nor will this rule of market overt extend to cases where the treaty for the sale was begun out of market; for the sale must be originally and wholly made in the fair or market<sup>9</sup>. Nor to sales not at the usual hours; for though a sale made between sun-setting and sun-rising is

<sup>1</sup> See the cases cited in 5 Co. 84, in notes.<sup>2</sup> 5 Co. 84.<sup>3</sup> Cro. Jac. 68.<sup>4</sup> 5 Co. 84. 2 Rol. Abr. tit. Market Overt, 50.<sup>5</sup> Ibid.<sup>6</sup> Wilkinson v. King, 2 Camp. N. P. C. 335.<sup>7</sup> 2 Inst. 712.<sup>8</sup> Ibid.<sup>9</sup> Ibid.

binding between the parties, yet it will not divest the owner's property in his goods<sup>1</sup>. Neither does it extend to pawns in market overt, for there can be no market overt for pawning<sup>2</sup>. Also, by statute 1 Jac. I. c. 21. it is provided, that the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property: and therefore, if goods be stolen and pawned, the owner may maintain trover against the pawnbroker<sup>3</sup>. Nor to sales to a man of his own goods, unless the property has been previously altered by a former sale. And notwithstanding any number of intervening sales, if the original vendor, who sold without being entitled to the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice<sup>4</sup>. So, if the owner has used due diligence in prosecuting the thief to conviction, he shall have restitution of his goods, though they have been sold in market overt<sup>5</sup>. But the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from any one who has purchased them *bonâ fide* in market overt, and sold them again before the conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession<sup>6</sup>. By which wise regulations, observes Sir William Blackstone, the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other policy, that purchasers, *bonâ fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller<sup>7</sup>.

But there is one species of personal chattels in which the

<sup>1</sup> 2 Inst. 713.    <sup>2</sup> Hartop v. Heare, 2 Str. 1187.    1 Wils. 8.    3 Atk. 44.

<sup>3</sup> Packer v. Gillies, 2 Camp. N. P. C. 336. n.

<sup>3</sup> But the statute does not protect goods obtained under false pretences; and therefore, where goods so obtained are pawned, it seems that the pawnee is entitled to retain his lien against the true owner, though he has prosecuted the offender to conviction. Parker v. Patrick, 5 T. R. 175.

<sup>4</sup> 2 Inst. 713.

<sup>5</sup> Ibid. 21 Hen. VIII. c. 11.

<sup>6</sup> Horwood v. Smith, 2 T. R. 750.

<sup>7</sup> 2 Bl. Com. 450.

property is not easily altered by sale, even in market overt, without the express consent of the owner, and that is horses. For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 P. and M. c. 7. and 31 Eliz. c. 12. By these statutes it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sun-set, in an open part of the market to be set apart for that purpose; and that all the parties to the bargain shall appear with the horse before the toll-gatherer, who must enter in a book the price, colour, and one mark at least of the horse, with the names and dwelling-places of such parties properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. And in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property; but, at any distance of time, may seize, or bring an action for his horse, wherever he happens to find him.

## SECTION VI.

### OF THE FULFILMENT OF THE CONTRACT BY PAYMENT AND DELIVERY.

#### 1. *As to Delivery.*

As much of the matter which is properly referable to the title Delivery of Goods has unavoidably been discussed in the third section of this chapter, little is left to be enlarged upon in this place. The cases, however, stated in that part of the work are only such as arose upon or out of the statute :

statute: it remains to state what constitutes a delivery in law.

The making of goods to be delivered, or otherwise separating them from a larger quantity, of which they formed a part, with a view to the delivery<sup>1</sup>; or the delivery of goods to a carrier to be forwarded to the vendee<sup>2</sup>, and *à fortiori*, if delivered to a carrier named by the vendee<sup>3</sup>; or the delivery of goods to a wharfinger<sup>4</sup>; have all been construed to be evidence of a delivery, and consequently to entitle the vendee to the price of the goods. So the shipment of goods, according to the order and on the account of the consignee, will operate as a delivery<sup>5</sup>.

But the mere act of packing goods sold in cloths which have been furnished by the vendee is no delivery<sup>6</sup>.

It has been held, that where several articles have been ordered at the same time, at separate and distinct prices, but forming one entire contract, the vendor cannot by a delivery of some of the articles entitle himself to the price of them separately, as in the case of a separate contract for each article; unless the vendee accepts any one article so delivered<sup>7</sup>.

## 2. *As to Payment.*

Where no time of payment is specified in the contract of sale, the money is demandable immediately upon the delivery of the goods<sup>8</sup>. But where the term of credit is specified, as where acceptances are given by the vendee for the value of the goods, or where a period is fixed for the payment, without the vendee being required to give any negotiable security in the mean time, the contract being executory on the part of the vendee till the time of such acceptances becoming due, or till the expiration of such pe-

<sup>1</sup> Keilway, 77. pl. 25.

<sup>2</sup> Dutton v. Solomonson, 3 Bos. and Pul. 582.

<sup>3</sup> Dawes v. Peck, 8 T. R. 330.

<sup>4</sup> Cooke v. Ludlow, 2 Bos. and Pul. 119.

<sup>5</sup> Huxham v. Smith, 2 Camp. N. P. C. 19. Brown v. Hodgson, Ibid. 36.

<sup>6</sup> Goodall v. Skelton, 2 Hen. Bl. 316.

<sup>7</sup> Champion v. Short, 1 Camp. N. P. C. 53.

<sup>8</sup> 1 Saik. 113.

riod of credit, the vendor cannot maintain an action for the value of his goods in the interim.

Thus, where goods were sold upon a contract that the vendee was to pay for them in three months by a bill at two months, it was held, that the contract was for a credit of five months; and therefore that assumpsit for goods sold and delivered could not be brought at the end of three months upon the neglect of the vendee to give his bill at two months: for when, by the terms of the sale, the vendee is to give his acceptance for the value of the goods at any given time, and omits or refuses so to do, the remedy is by a special action on the case for damages for the breach of contract in not giving or accepting such bill<sup>1</sup>.

Where goods had been sold at two months credit, to be paid for by a bill at twelve months, and more than fourteen months had expired between the delivery of the goods and the commencement of the action; an action for goods sold and delivered is maintainable<sup>2</sup>.

But though, where credit has been given at the time of the sale of goods, no action lies till the expiration of the time given; yet if the credit given was a voluntary act of the vendor, subsequent to and not making part of the original contract, or that the purchase was not *bonâ fide* on the part of the vendee, it may at any time be revoked<sup>3</sup>, unless in such case the vendor takes a bill or note payable at a future day; and then, if the bill or note is a valid security, he cannot commence an action for the original debt until the time the bill or note has to run<sup>4</sup>.

In some branches of trade custom has fixed one universal

<sup>1</sup> *Mussen v. Price* and another, 4 East's Rep. 147. And see *Millar v. Shaw*, cited in the same case, and *Dutton v. Solomonson*, 3 Bos. and Pul. 582.

<sup>2</sup> *Brooke v. White*, 1 Bos. and Pul. N. R. 330.

<sup>3</sup> *De Symons v. Minchwich*, 1 Esp. N. P. C. 430.

<sup>4</sup> *Stedman v. Gooch*, *Ibid.* 3.



standard as to the period of credit upon sales of goods ; and upon sales in the usual course of such trades, where no specific stipulation is made in the contract, this customary credit is as much a part of the contract as if expressly agreed upon, the law implying that all persons deal according to the general usage, unless the contrary appears.

Where by the terms of the contract part of the money is paid in hand, and a security for the remainder is taken at a future day, but which security is given on a wrong stamp, the vendor cannot sue till the period of payment to be given by the security arrives <sup>1</sup>.

So where the vendor agrees to deliver certain goods at a certain price, within a limited time, he cannot demand payment till the whole of the goods are delivered ; for the contract is entire, and cannot be split, and therefore no action lies until the whole quantity is delivered, or until the time of delivering the whole has arrived <sup>2</sup>.

The permission of the vendor for the purchaser to carry away part of the goods without payment is no waiver of the vendor's right to be paid for goods on delivery ; such permission is only a dispensation pro tanto, and the vendor is entitled at any time to stand on his right to be paid according to the contract <sup>3</sup>.

As in all sales of goods the law implies a contract that those goods shall be paid for ; if payment of goods bought or sold be made by a check or draft upon a banker, and before payment thereof is obtained the banker fails, it is now clearly settled, that the original debtor is not discharged, unless the party who took the check, &c. has been guilty of negligence in presenting it for payment, or that it was expressly agreed at the time of giving it, that it should be taken as payment, and that the party taking it should run

<sup>1</sup> Swears v. Wells, 1 Esp. N. P. C. 317.

<sup>2</sup> Waddington v. Oliver, 2 Bos. and Pul. N. R. 61.

<sup>3</sup> Payne v. Shadbolt, 1 Camp. N. P. C. 427.

all risks of its being paid<sup>1</sup>. It has also been determined, that if a creditor is offered cash in payment of his debt, or a check on a banker from an agent of his debtor, and he prefers the latter, that the debtor is not discharged if the check is dishonoured; although the agent fails with a balance of his principal in his hands to a larger amount<sup>2</sup>. But where goods were sold by A. to B., for which the latter was to pay by a bill at three months; and B. gave A. a check on his bankers (who were also the bankers of A.) requiring them to pay A. on demand by a bill at three months; and A. paid the check into the hands of the bankers and took no bill from them, but the amount was transferred in the bankers' books from B.'s account to A.'s, with the knowledge of both, and the bankers failed before the check became due: held that A. could not recover the value of the goods against B., for such transfer amounted to payment<sup>3</sup>. In a case, however, under the same circumstances, where the amount had not been transferred in the banker's books from the account of the vendee of the goods to that of the vendor; it was held, that in the event of the failure of the banker, the vendee was still liable for the value of the goods<sup>4</sup>.

Whether interest ought to be allowed upon a demand for goods sold and delivered, some contrariety of opinion has subsisted. The law respecting this matter may however be collected from what fell from Lord Ellenborough in the case of *De Haviland v. Bowerbank*<sup>5</sup>. His lordship laid it down as a general rule, "that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c.; or where

<sup>1</sup> Ex parte Blackburn, 10 Ves. Jun. 204. *Owenson v. Morse*, 7 T. R. 65.

<sup>2</sup> *Everett v. Collins*, 2 Camp. N. P. C. 515.

<sup>3</sup> *Bolton v. Richard*, 6 T. R. 139.

<sup>4</sup> *Brown v. Kewley*, 2 Bos. and Pul. 518.      <sup>5</sup> 1 Camp. N. P. C. 51.

there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used, and interest has been actually made. In the case of *Gordon v. Swan*<sup>1</sup>, his lordship observed, that what he said as to payment to be made on a certain day, must be understood to refer to written contracts only, such as bills of exchange, promissory notes, &c.

By the above-mentioned case of *Gordon and Swan*, it appears that interest is not allowable on a demand for goods sold and delivered, unless a bill of exchange had been agreed to be given for the payment of the goods; and then the vendor will be entitled to interest for the price of his goods from the time the bill, if given, would have become due<sup>2</sup>; and that whether the vendee has or has not accepted the goods<sup>3</sup>.

So where, from the usage of a particular trade, the intention of the parties that a book-debt shall bear interest can be collected, interest will be allowed<sup>4</sup>.

## SECTION VII.

### OF THE AVOIDANCE OR ALTERATION OF A CONTRACT.

A CONTRACT of sale cannot be rescinded but by the mutual consent of the contracting parties, or by the original terms of the contract: it is not in the power of one alone to do it, unless both parties can be put *in statu quo* as before the contract<sup>5</sup>.

And if one of the contracting parties assents to the contract being rescinded, if the other party does any act

<sup>1</sup> 12 East's Rep. 419.

<sup>2</sup> *Marshall v. Poole*, 13 East's Rep. 98. *Porter v. Palsgrave*, 2 Camp. N. P. C. 472.

<sup>3</sup> *Boyce v. Warburton*, 2 Camp. N. P. C. 480.

<sup>4</sup> *Eddowes v. Hopkins*, Doug. 376.

<sup>5</sup> *Smith v. Field*, 5 T. R. 402. *Towers v. Earrett*, 1 Ibid. 133. *Hunt v. Silk*, 5 East's Rep. 449.

which

which shows his affirmance of the contract, the contract will be deemed complete. Thus, where the vendee of goods, being apprehensive of his insolvency, sent word to the vendor to take back his goods, but the vendor instituted an attachment to attach the goods in the hands of a packer as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt, it was held that the vendor could not recover the goods from the packer in trover<sup>1</sup>.

But though the renunciation of the contract by the vendee will not have the effect of revesting the property in the vendor, if he has done any act by which he shows that he considered the goods as the property of the vendee; yet it has been decided, that if goods are bought by an agent for the vendee, and delivered by him to the vendee's packer, in whose hands they are attached by the vendee's creditors, the property revests in the vendor so as to avoid the attachment, if the vendee countermanded the purchase by letter to his agent, dated before such delivery, though not received till afterwards, and the vendor assented to take back the goods<sup>2</sup>.

So where the goods were sent by the vendee to a third person, and accepted by him to the use of the vendor before the bankruptcy, although notice was not sent to the vendor, of such a delivery to his use till after the bankruptcy, it was held a sufficient countermand and relinquishment by the vendee, so as to revest the property in the vendor<sup>3</sup>.

Upon a bargain for the sale of goods, if the vendee does not come and pay for them, and take them away in a reasonable time after request, the vendor may elect to consider the contract as rescinded, and resell the goods<sup>4</sup>.

So where some act is to be done by each party under a

<sup>1</sup> *Smith v. Field*, 5 T. R. 402.

<sup>2</sup> *Atkins v. Barwick*, 1 Str. 165.

<sup>3</sup> *Salte v. Field*, 5 *Ibid.* 211.

<sup>4</sup> *Langfort v. Tyler*, 1 Salk. 113.

special agreement, and the vendor by his neglect prevents the vendee from carrying the contract into execution, the vendee may rescind the contract, and recover back any money he has paid under it. The facts of the case were shortly these: the defendant agreed, on the 6th of June 1791, to sell to the plaintiff all his cordwood then growing at 11s. 6d. per cord, ready cut, which was to be paid for by the plaintiff in March 1792, and cut, corded, and cleared off the premises by the defendant by Michaelmas following. It also appeared that the custom was for the seller to cut off the boughs and trunks, and cord the wood, and for the buyer to re-cord it; after which it became his property. The defendant cut sixty cords, ten of which he corded, and the plaintiffs re-corded half a cord, and measured the rest. On the 8th of March 1792 the plaintiff paid the defendant twenty guineas; but the defendant neglecting to cord the rest of the wood, the plaintiffs brought this action to recover back the twenty guineas, as having been paid on a contract that had failed: held that they were entitled to recover<sup>1</sup>.

A contract for the sale of goods may also be avoided by the statute of limitations, 21 Jac. I. c. 26. or the time limited by act of parliament, beyond which no plaintiff can lay his cause of action. The use of this statute was to prevent the setting up of stale claims, when perhaps all vouchers and documents relating to the transaction were either lost or destroyed; or, as Sir William Blackstone says, for preserving the peace of the kingdom, and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for an injury committed at any distance of time.

By this statute of 21st Jac. I. c. 16. s. 3. it is enacted, "that all actions of account and upon the case, other than such accounts as concern the trade of merchandize between

<sup>1</sup> *Giles v. Edwards*, 7 T. R. 181.



merchant and merchant, their factors and servants, shall be commenced and sued within the time and limitation hereafter expressed, viz. the said actions upon the case, and the said actions for account, &c. within six years next after the cause of such actions or suits, and not after."

It has been a subject of much controversy, whether the exception relative to merchants' accounts extends to all actions and accounts relating to merchants and merchandize, or to actions of account open and current only; the words of the statute being, "all actions of account and upon the case, other than such actions as concern the trade of merchants;" so that by the words "other than such actions," not being actions of account, it has been insisted that all actions concerning merchants are excepted. But it is now settled, that accounts open and current only are within the statute. Therefore, if an account be stated and settled between merchant and merchant, and a sum certain be agreed to be due to one of them; if, in such case, he to whom the money is due does not bring his action within the limited time, he is barred by the statute<sup>1</sup>; but if it be only adjusted, and a following account is added, in such case the plaintiff shall not be barred by the statute, because it is a running account<sup>2</sup>. It is a pretty difficult construction, said Lord Hardwicke in the case of *Welford v. Liddle*<sup>3</sup>, how to apply the exception in the statute relating to merchants' accounts. It is not, that the defendant may not plead the statute in all cases where the account is closed and concluded between the parties, and the dealing and transaction over. It was not the meaning to hinder that, but it was to prevent *dividing* the account between merchants where it was a *running* account, when perhaps *part* might have been long *before* the time of the statute, and

<sup>1</sup> *Webber v. Tivill*, 2 Saund. 124, and note 6.

<sup>2</sup> *Farrington v. Lee*, 2 Mod. 311.

<sup>3</sup> 2 Ves. 400.

the account never settled, and perhaps there might have been dealings and transactions *within* the time of the statute.

So if there be a mutual account of any sort between the plaintiff and defendant for any item for which credit has been given within six years, that is evidence of an acknowledgement of there being such an open account between the parties, and a promise to pay the balance, as to take the case out of the statute <sup>1</sup>.

So where there is a mutual unsettled account, and reciprocal demands, the statute of limitations does not attach <sup>2</sup>.

But where all the items are on one side, as in an account between a tradesman and his customer, the last item which happens to be within six years shall not draw after it those which are of a longer standing, but the statute will bar those beyond six years <sup>3</sup>.

To the plea of the statute of limitations the courts have shown such discountenance, that it has been held, that the statute does not extinguish the plaintiff's right of action, but suspends the remedy only, and that this suspension is capable of being removed by a subsequent promise on the part of the defendant within the limited time. In *Hyleing v. Hastings* <sup>4</sup>, Lord Holt said, "Doubtless an express promise will revive the debt, though it were twenty years after." And not only an express promise, but any acknowledgement of the existence of the debt, however slight, will take it out of the statute, and the limitation will run from that time. Thus expressions to the following effect, "Prove your debt, and I will pay you <sup>5</sup>. I am ready to account, but nothing is due;" "I do not consider

<sup>1</sup> *Catling v. Skoulding*, 6 T. R. 189.

<sup>2</sup> *Cranch v. Kirkman*, Peake's N. P. C. 120. Bul. N. P. 149.

<sup>3</sup> Bul. N. P. 141. *Catling v. Skoulding*, 6 T. R. 189.

<sup>4</sup> *Ld. Raym.* 389.

<sup>5</sup> 1 *Salk.* 29.

myself as owing Mr. B. a farthing, it being more than six years since I contracted ;” “ I have had the wheat I acknowledge, and have paid for some of it, and 261*l.* remains due <sup>1</sup> :” and much slighter acknowledgements than these, will take a debt out of the statute <sup>2</sup>.

The statute makes an exception for all persons who shall be under age, *feme-coverts*, *non compos mentis*, in prison, or abroad, when the cause of action accrues, and the limitations of the statute shall only commence from the time when their respective impediments or disabilities are removed, sec. 7. But if one only of a number of partners lives abroad, they must bring their action within six years after the cause of it accrued <sup>3</sup>.

A contract may also be avoided on the ground of fraud ; for either “ *suppressio veri*” or “ *suggestio falsi*” is a good reason to set aside any contract <sup>4</sup>. And therefore, where a party has been guilty of any fraud in his dealings or accounts, the courts of law and equity have determined, that he shall only protect himself by the statute of limitations from the time his fraud is discovered <sup>5</sup>.

It does not seem improper to speak in this place of contracts for the sale of goods entered into by a debtor with intent to defraud his creditors.

All contracts entered into for the sale or assignment of goods, where the vendor is suffered to remain in the possession of them, are, by the statute 13 Eliz. c. 5, void as against creditors. The words of the statute are, “ It is declared, ordained, and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease &c. that then was, or at any time

<sup>1</sup> 4 East's Rep. 599.

<sup>2</sup> Per Id. Mansfield, Cowp. 548.

<sup>3</sup> Perry v. Jackson, 4 T. R. 516.

<sup>4</sup> Broderic v. Broderic, 1 P. Wms. 240.

<sup>5</sup> South Sea Company v. Wymondsell, Doug. 630.

thereafter should be had or made, to or for any intent or purpose before declared and expressed, should be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful covenants and fraudulent devices and practices aforesaid, were, or should or might be in any wise disturbed, hindered, delayed, or defrauded,) to be clearly and utterly void, frustrate, and of no effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.”

In the construction of this statute it has been uniformly held, that all transfers or assignments of property by way of bill of sale will be fraudulent, and consequently void, as against creditors, unless absolute possession<sup>1</sup> accompanies and follows the deed<sup>2</sup>; and the case will not be varied if the creditor has suffered his debtor to continue in possession of the goods, although he had conditioned that the profits of the trade should be accounted for to trustees from the date of the assignment<sup>3</sup>; or that he had reserved to himself the liberty of taking possession of them within a stipulated time<sup>4</sup>; or that he had possessed himself of them, if he suffers the debtor to exercise any act of ownership over them<sup>5</sup>. So a bill of sale to a particular creditor of *all* the effects of a trader, in trust to satisfy his debt, and

<sup>1</sup> When goods are either sold or mortgaged they ought to be delivered specifically, or the key of the warehouse where they are, &c. with the possession thereof. The delivery of the muniments, books, and writings relating to choses in action is tantamount to a specific delivery. If a bond be assigned, the bond must be delivered, and notice must be given to the debtor; but in an assignment of book debts notice alone is sufficient, because there can be no delivery. *Ryall v. Rolles*, 1 Ves. 348. 1 Atk. 165. 1 Wils. 260.

<sup>2</sup> *Twyne's Case*, 3 Co. 80 b. *Cadogan v. Kennell*, Cowp. 484.

<sup>3</sup> *Bamford v. Baron*, 2 T. R. 594. n.

<sup>4</sup> *Edwards v. Harben*, *Ibid.* 587.

<sup>5</sup> *Paget v. Perchard*, 1 Esp. N. P. C. 205.

pay over the surplus (if any) to the trader, is of no effect as a conveyance, though followed by an immediate change of property <sup>1</sup>.

But the not taking possession at the time of the conveyance, though it is in some measure indicative of fraud, is not conclusively so. For if a bill of sale be made, to take effect at some future time, or upon condition, or if it be made under the authority of a court of equity, or by the sheriff under an execution for a just debt, and so expressed therein, the sale will not be rendered void by the vendor's continuing in possession till the condition be performed <sup>2</sup>.

So a bill of sale of goods made for a valuable consideration, though unaccompanied with possession, is valid as against creditors (as well as against the vendor himself), if given with their knowledge and assent <sup>3</sup>.

The discussion of this point seems to superinduce the mention of the effect of a judgement upon a contract previously entered into for the sale of goods.

It is a general rule, that where a man has an absolute property in goods and chattels, he has also an absolute and indefeasible right of disposing of them as he may think proper. In cases, however, where a judgement has been obtained for any debt or damages, all contracts entered into for the sale or purchase of goods, though *bonâ fide* and for a valuable consideration, are by the statute 29 Car. II. c. 3. s. 16. null and void from the delivery of the writ to the sheriff; and the person obtaining such judgement has a lien upon the property of him against whom it is given, so as to bind his property, and defeat any intermediate disposition

<sup>1</sup> *Newton v. Chantler*, 7 East's Rep. 137.

<sup>2</sup> *Edwards v. Harben*, *ut supra*. *Cadogan v. Kennell*, Cowp. 432. *Jarman v. Woolleton*, 3 T. R. 618. *Kidd v. Rawlinson*, 2 Bos. and Pul. 59. *Haselinton v. Gill*, 3 T. R. 620.

<sup>3</sup> *Steel v. Brown*, 1 Taunt. 381.



of it between the delivery of the writ and the execution of the judgement.

A *bouâ fide* sale of goods in market overt, to an innocent vendee, without notice of the execution, is not, however, subject to the lien of a third person under a judgement <sup>1</sup>.

## SECTION VIII.

### OF THE WARRANTY OF GOODS SOLD.

In contracts for the sale of goods, it is constantly understood, that the seller undertakes that the commodity he sells is his own; and that if it proves otherwise, and the vendee suffers by the insufficiency of his (the vendor's) title, he may recover a satisfaction from the vendor <sup>2</sup>. Also, if, upon the sale of any thing, the vendor warrants it to be good, the law annexes a tacit contract to this warranty, that if it be not so he shall make compensation to the buyer <sup>3</sup>. And therefore, if the articles sold appear on delivery to be of a different quality from that ordered by the vendee, or that he discovers some latent imperfection which was not visible to a man of ordinary circumspection at the time of purchasing, he may, on the immediate discovery of their not answering the order, return them and rescind the contract <sup>4</sup>. But unless the vendor expressly warrants the article sold to be sound and good <sup>5</sup>; or that he knew it to be otherwise, and had used any art to disguise the defect <sup>6</sup>, or that it turns out to be different from what the vendor represented it to be, upon the faith of which representation it was bought by the vendee <sup>7</sup>, the vendee is without remedy; for though it is a general rule of law, that the vendor is bound to disclose to the buyer all latent defects

<sup>1</sup> 2 Eq. Cas. Abr. 381.

<sup>2</sup> 1 Bl. Com. 165.

<sup>3</sup> Ibid.

<sup>4</sup> Fisher v. Samuda, 1 Camp. N. P. C. 193.

<sup>5</sup> 1 Rol. Abr. p. 90. tit. Action sur Case, (P) 4.

<sup>6</sup> Ibid. (P) 3.

<sup>7</sup> Ibid. 91. (P) 7.

known to him ; yet the common law will not imply a warranty, the maxim being “ *caveat emptor* <sup>1</sup>.”

The warranty must be upon the sale ; if it be made after, it must be reduced into writing, otherwise it will not be binding upon the vendor <sup>2</sup>.

In all cases of express warranty, if the warranty prove false, or the goods are in any shape different from what the vendor represents them to be to the buyer, the vendor is answerable for their goodness. Thus, if cloth is warranted to be of such a length, when it is not <sup>3</sup>; that a horse is sound, and he wants the sight of an eye <sup>4</sup>; or that wool is merchantable, which is full of moths <sup>5</sup>; in these cases action lies to recover damages for this imposition.

But a general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, or where the false representation of the vendor is known to the vendee <sup>6</sup>; as if a horse with a visible defect be warranted perfect, or the like, the vendee has no remedy <sup>7</sup>.

The inserting of the name of an artist in a catalogue as the painter of a particular picture, has been held not to be such a warranty as will subject the party selling to an action, if it appears that he was mistaken, and only represented what he himself believed, though such painting was not the work of the artist to whom it was attributed <sup>8</sup>.

Neither does the law, upon a sale of goods by sample, with a warranty that the bulk of the commodity answered the sample, raise an implied warranty that the commodity should be merchantable ; though a fair merchantable price were given ; and therefore, if there be a latent defect

<sup>1</sup> Noy's Max. c. 42.

<sup>2</sup> Bl. Com. 166. Fitz. N. B. 98. K.

<sup>3</sup> Finch. L. 139.

<sup>4</sup> 1 Rol. Abr. c. 96. Z. 1. 20.

<sup>5</sup> Ibid. 40.

<sup>6</sup> *Butterfield v. Barrroughs*, 1 Salk. 211. *Dyer v. Hargrave*, 10 Ves. Jun. 507.

<sup>7</sup> Kit. 174. b.

<sup>8</sup> *Jendwine v. Slade*, 1 Esp. N. P. C. 572.

then

then existing in them, unknown to the seller, and without fraud on his part, he is not answerable, though the goods may turn out to be unmerchable<sup>1</sup>.

But a sale of goods by sample is such a warranty, that if the bulk does not accord with the sample, the purchaser is not bound to accept or pay for the goods, on any terms; although no fraud was intended on the part of the vendor, and although there may exist an usage in the particular trade for the vendor, on payment of the difference arising from the inferiority of the sample to the bulk, and which difference was estimated by sworn brokers, to compel the vendee to stand to the bargain<sup>2</sup>.

But if goods are delivered generally of the sort ordered according to the sample and paid for, however bad their quality may be, and although they are wholly unfit for use, yet no action can be maintained to recover back the price; but the vendee must sue upon the warranty that the bulk was equal to the sample<sup>3</sup>. And if a party purchases an article at a certain price, pursuant to a specimen exhibited, and, on delivery, it is found to be of an inferior quality, in an action for the price, he cannot set up the inferiority of it as a defence; he should return it, and rescind the contract in toto<sup>4</sup>.

As to the validity of warranties given by servants, authorized to sell their masters' property; it has been held that such warranties will bind the master, as the servant will be presumed to be acting within the scope of his authority, and vested with sufficient power to transact the business with which he is intrusted in the common and usual manner<sup>5</sup>.

<sup>1</sup> *Parkinson v. Lee*, 2 East's Rep. 314.

<sup>2</sup> *Hibbert v. Shee*, 1 Camp. N. P. C. 113.

<sup>3</sup> *Fortune v. Lingham*, 2 Ibid. 416.

<sup>4</sup> *Grimaldi v. White*, 4 Esp. N. P. C. 95.

<sup>5</sup> *Alexander v. Gibson*, 2 Camp. N. P. C. 555.

## CHAPTER VI.

### OF MERCANTILE CONTRACTS FOR THE CONVEYANCE OF GOODS PURCHASED FROM THE VENDOR TO THE VEN- DEE.

#### FIRST, BY LAND.

ALL persons carrying goods for hire (but not hackney-coachmen in London, except there is an express agreement, and money paid for the carriage of goods<sup>1</sup>), are bound on the general custom of the realm, that is, by the common law, to receive and carry the goods of the subject for a reasonable hire or reward, to take due care of them in their passage, to deliver them safely and in the same condition as when they were received; or, in default thereof, to make compensation to the owner for any loss or damage which happens while the goods are in their custody<sup>2</sup>; except such loss or damage as arises from the act of God, as storms, tempests, and the like; or from the king's enemies; or from the default of the party sending them<sup>3</sup>.

Upon the ground that a carrier is not liable for an accident occasioned by the act of God (viz. inevitable accident), it has been held, that if a bargeman in a tempest, for the safety of the lives of his passengers, throws overboard any trunks or packages, he is not liable<sup>4</sup>.

A carrier is also liable for any inevitable accident, happening through the intervention of any human means, provided such loss happens while the goods are in his custody.

Thus, where goods intrusted to a common carrier were consumed by an accidental fire communicating to a booth

<sup>1</sup> *Upshare v. Aidee*, 1 Com. 25.

<sup>3</sup> 1 Inst. 89. Bul. N. P. 70.

<sup>2</sup> 1 Selw. N. P. 413.

<sup>4</sup> 1 Rol. Rep. 79.

in which the goods had been deposited by the carrier in the course of his journey, he was held liable <sup>1</sup>.

So where common carriers from A. to B. charged and received for cartage of goods to the consignee's house at B., from a warehouse there, where they usually loaded, but which did not belong to them; they were held responsible for a loss by an accidental fire while the goods were in the warehouse; although they allowed all the profits of the cartage to another person, and which circumstance was known to the consignee <sup>2</sup>.

These two cases differed in circumstances, but were both governed by the contract of undertaking to deliver; it appearing in evidence, that the goods had not reached the place of their final destination. Where, however, goods not having arrived at the place of final delivery, are out of the custody of the carrier *as such*, this construction does not apply. On this distinction it has been determined, that a common carrier between A. and B., employed to carry goods from A. to B., to be forwarded to a third place (by another carrier, according to the custom); was not, by putting them gratuitously in his warehouse at B., where they were accidentally destroyed by fire before he had an opportunity of forwarding them, responsible for the loss <sup>3</sup>.

Whether it is a duty incumbent upon carriers to deliver as well as carry goods, may be collected from the case of *Golden v. Manning*, 3 Wils. 429. and 2 Bl. Rep. 916; the circumstances of which were: A box was directed to A. in B. street in London; the direction was obliterated; but A.'s name and abode were in the printed directory; his name only in the way-bill; the defendants made no inquiry of

<sup>1</sup> *Forward v. Pittard*, 1 T. R. 27.

<sup>2</sup> *Hyde v. the Trent and Mersey Navigation Company*, 5 Ibid. 399.

<sup>3</sup> *Garside v. the Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581.



the plaintiff, nor of A., but suffered the box to remain in their warehouse till the goods were damaged, although they kept a constant porter to carry out parcels. The court were of opinion that the defendants were liable, because it appeared that their general course of trade was to deliver goods at the houses to which they were directed, that they received a premium, and kept a servant for that special purpose. Mr. Justice Gould expressed an opinion, that all carriers were bound to give notice of the arrival of goods to the persons to whom they were consigned, whether bound to deliver or not. Also in *Hyde v. the Trent and Mersey Navigation Company*, 5 T. R. 396. Ashhurst, Buller, and Grose, Justices, were of opinion that a carrier was bound to deliver the goods to the person to whom they were directed.

Before the time of Henry the Eighth, it appears to have been generally held, that a common carrier was chargeable, in case of a loss by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at an inconvenient hour; but in the commercial reign of Elizabeth, it was resolved, upon the broad principles of policy and convenience, that if a common carrier is robbed of the goods delivered to him, he shall answer for the value of them; for, having his hire, there is an implied understanding for the safe custody and delivery of the goods<sup>1</sup>.

If a common carrier who is offered his hire, and who has convenience, refuses to carry goods, he is liable to an action<sup>2</sup>. But he may refuse to admit goods into his warehouse at an unseasonable time, or before he is ready to take his journey<sup>3</sup>.

In order to charge the carrier, these circumstances are to be observed:

<sup>1</sup> 1 Inst. 89 a. 1 Rol. Abr. 338.

<sup>2</sup> *Jackson v. Rogers*, 2 Show. 327.

<sup>3</sup> *Lane v. Cotton*, 1 Id. Raym. 652.

1. The goods must be lost while in possession of the carrier himself, or in his sole care. Therefore, where the plaintiffs, the East India Company, sent their servant on board the vessel, who took charge of the goods in question, and they were lost, the defendant was held not to be liable<sup>1</sup>.

2. The carrier is liable only as far as he is paid, for he is chargeable by reason of his reward.

A person delivered to a carrier's book-keeper two bags of money, sealed up, and containing 400*l.* to be carried from London to Exeter, and told him they contained 200*l.*, and took his receipt for the same, with a promise of delivery for ten shillings per cent. carriage and risk: the carrier having been robbed, his responsibility was held not to extend above 200*l.*<sup>2</sup>

So where 100*l.* was delivered in a bag to the carrier's book-keeper, by the plaintiff's servant, and paid for as a common parcel; when lost, the carrier was not held to be liable, it being proved that he had, by public advertisement, limited his responsibility as to any money, plate, jewels, writings, or other valuable goods, unless they were entered as such and paid for accordingly<sup>3</sup>.

3. Under a special or qualified acceptance, the carrier is bound no further than he undertakes.

Therefore, where the owner of a stage-coach puts out an advertisement, "that he will not be answerable for money, plate, jewels, watches, writings, goods, or any package whatever, (if lost or damaged,) above the value of 5*l.* unless insured and paid for at the time of the delivery;" all goods received by him are under that special license; and therefore if they are lost, the proprietor of the stage coach is not answerable, not even to the extent of the 5*l.* or the sum paid for

<sup>1</sup> East India Company v. Pullen, 1 Str. 690.

<sup>2</sup> Tyler v. Morrice, Carth. 485.

<sup>3</sup> Gibbon v. Paynton, Bul. N. P. 71.

booking<sup>1</sup>. But in order to defend himself in an action, the carrier must prove that such notice was stuck up in a conspicuous part of the office when the owner brought his goods, or that it was advertised in a newspaper which he was accustomed to read<sup>2</sup>. And Lord Ellenborough has strongly expressed his disapprobation of the great alterations which have been made in the common law obligation; his lordship having declared, that in every case where a carrier sets up a special engagement as his defence, he would require proof of actual notice to the owner of the article<sup>3</sup>.

4. A delivery to the carrier's servant is a delivery to himself, and shall charge him; but they must be goods such as it is his custom to carry, and not out of his line of business.

The action against a carrier for the non-delivery or loss of goods must be brought by the person in whom the legal right of property in the goods in question is vested at the time; for he is the person who has sustained the loss, if any, by the negligence of the carrier. Hence, where a tradesman orders goods to be sent by a carrier, at the moment the goods are delivered to the carrier it operates as a delivery to the purchaser, and the whole property (subject only to the right of stoppage *in transitu* by the seller) vests in the purchaser; he alone can maintain an action against the carrier for any loss or damage to the goods<sup>4</sup>: and this rule holds as well where the carrier is not particularized as where he is<sup>5</sup>.

But if there is a special agreement by the parties, that the consignor is to pay for the carriage of the goods, the action is maintainable by the consignee<sup>6</sup>.

With respect to the responsibility of the post-office, it

<sup>1</sup> Clay v. Willan, 1 H. Bl. 298. Izett v. Mountain, 4 East's Rep. 371. Nicholson v. Willan, 5 *ibid.* 507.

<sup>2</sup> 4 Esp. N. P. C. 178.

<sup>3</sup> 4 East's Rep. 37.

<sup>4</sup> Dawes v. Peck, 8 T. R. 330.

<sup>5</sup> 3 Bos. and Pul. 584.

<sup>6</sup> Davis and Jordan v. James, 5 Bur. 2680, Moore v. Wilson, 1 T. R. 659.

has been determined that the postmaster-general is not answerable for the loss of a letter or packet containing exchequer bills or money, occasioned by the receiver at the post-office<sup>1</sup>. Neither is the receiver liable to make good such a loss, unless he appears to have been guilty of personal misconduct<sup>2</sup>.

#### SECONDLY, BY WATER.

##### *1. Of the Duty of the Owner and Master with respect to the Preparation for, and Commencement of, the Voyage.*

It is the first duty of the owner to provide a vessel fit for the purpose or employment for which he offers and holds it forth to the public; that is, the vessel must be tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage<sup>3</sup>. He must also supply her with an adequate number of persons of competent skill and ability to navigate her. Where by usage or the laws of the country a pilot is required, he must provide such a person<sup>4</sup>; and he cannot limit his responsibility in these respects by any public notice<sup>5</sup>.

The commencement of the master's duty, as to the manner of taking goods on board, depends on the custom of the particular place. If he receive goods at the key or beach, or send his boat for them, his responsibility commences on his receiving of them<sup>6</sup>. Where goods are to be carried coastwise, and the usage of the wharf is to deliver them to the mate of the ship, by which they are to be carried; on delivery to him, the wharfinger's responsibility is at an end, and he is not liable, though the goods are lost from the wharf before they are shipped<sup>7</sup>. The master must

<sup>1</sup> *Lane v. Cotton*, Carth. 487. 12 Mod. 482. 1 Ld. Raym. 646. *Whitfield v. Lord Le Despenser*, Cowp. 754.

<sup>2</sup> Cowp. 765.

<sup>3</sup> *Molloy*, b. ii. c. 2. s. 10.

<sup>4</sup> *Ibid.* s. 7.

<sup>5</sup> *Lyon v. Mellis*, 5 East's Rep. 428. *Ellis v. Turner*, 8 T. R. 531.

<sup>6</sup> *Molloy*, b. ii. c. 2. s. 2.

<sup>7</sup> *Corban v. Downe*, 5 Esp. N. P. C. 41.

not take any contraband goods<sup>1</sup> nor colourable papers on board<sup>2</sup>, which may occasion the forfeiture, capture, or detention of the ship. He must take care that the goods of which the cargo consists be so stowed that they may not be injured by each other, or by the motion or leakage of the ship: but if by usage or agreement the stowage or arrangement of the goods is to be performed by persons hired by the merchant, he is then released from this obligation<sup>3</sup>. And as soon as any goods are put on board, the master must provide a sufficient number of persons to protect them<sup>4</sup>.

After the necessary preparation for the commencement of the voyage, the master must forthwith obtain the necessary clearances, and, as soon as the weather is favourable, proceed upon his voyage<sup>5</sup>. But he must not upon any account set sail during tempestuous weather<sup>6</sup>. And if there has been an undertaking or warranty to sail with convoy, he must conduct his vessel to the place of rendezvous, and put himself under the protection and control of the ships appointed for that purpose.

## 2. *Of the Duty of the Owner and Master during the Course of the Voyage.*

Having commenced his voyage, the master must proceed to the place of destination without delay, and without stopping at any intermediate port, or deviating from the straight and shortest course, unless to repair his ship, or to avoid enemies or pirates. A ship, however, is allowed to deviate for a supply of water and provisions to the places usually resorted to in long voyages for that purpose<sup>7</sup>. But neither in this case, nor if the ship be driven into a port through stress

<sup>1</sup> Molloy, b. ii. c. 2. s. 7.

<sup>3</sup> Wellwood's Sea Laws, p. 29.

<sup>5</sup> 2 Magens, 102.

<sup>7</sup> Roccus de Assec. not. 52.

<sup>2</sup> Ibid. s. 9.

<sup>4</sup> Morse v. Slue, 1 Ventr. 190.

<sup>6</sup> Molloy, b. ii. c. 2. s. 4.



of weather, can the master wait there longer than necessity requires<sup>1</sup>.

If the vessel be rendered unfit to proceed on the voyage, the master may freight another ship to transport the cargo to the place of destination, or he may sell it, according as the one or other will be of most advantage to the merchant<sup>2</sup>. But if his own ship can be repaired, and the cargo is not of a perishable nature, he is not bound to tranship or sell it. And if he has occasion for money for the repairs of his ship, or other expense necessary for him to prosecute and complete the voyage, and cannot otherwise conveniently obtain it, he may either hypothecate the whole cargo, or sell a part of it for this purpose<sup>3</sup>.

The master must also during the voyage take all possible care of the cargo; and therefore if goods are spoiled by a leak occasioned in the vessel by rats, he will be responsible for the damage<sup>4</sup>, unless he had cats on board his ship<sup>5</sup>.

### *3. Of the Duty of the Owner and Master on the Completion of the Voyage.*

When the ship has arrived at her place of destination, the master is without delay to deliver the cargo to the merchant or his consignees, upon production of the bills of lading and payment of the freight and other charges due in respect of it. But he cannot detain the goods on board the ship until these payments are made. If he is doubtful of the payment, he may send the goods to a wharf, and order the wharfinger not to part with them until the merchant discharges his demand for the freight and other charges<sup>6</sup>.

The manner of delivering the goods, and consequently the period at which the responsibility of the master and

<sup>1</sup> Abbott's Merchant Shipping, p. 240.

<sup>2</sup> Molloy, b. ii. c. 4. s. 5.

<sup>3</sup> The Gratitude, 3 Rob. Adm. Rep. 240.

<sup>4</sup> Dale v. Hall, 1 Wils. 281.

<sup>5</sup> Roccus, not. 58.

<sup>6</sup> Abbott's Merchant Shipping, 246.

owners will cease, Mr. Abbott observes, will depend upon the custom of particular places and the usage of particular trades. The liability of a hoyman is not discharged by delivery of the goods at the wharf at which he plies; but he is bound to deliver them safe to the consignee according to the direction<sup>1</sup>. And if the owner of the goods require the master of the vessel not to land the goods on the wharf against which the vessel may be moored, which he promises not to do, but afterwards delivers them to the wharfinger for the owner's use, under the idea of the wharfinger's lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, the master is liable to the owner, unless he can establish the wharfinger's rights<sup>2</sup>. But when goods are brought here from foreign countries, a delivery at the usual wharf is such a delivery as will discharge the master<sup>3</sup>.

By the custom of the river Thames the master of a vessel is bound to guard goods loaded into a lighter sent for them by the consignee until the loading is completed, and cannot discharge himself from that obligation by declaring to the lighterman that he has not sufficient hands on board to take care of them<sup>4</sup>.

#### 4. *Of the Causes which excuse the Owner and Master.*

We have already seen (page 232) that a carrier is in general excused for a non-performance of the contract on his part, occasioned by any event falling within the meaning of the expression "the act of God." The same exemption extends to the owners and masters of ships, who are also indemnified from perils of the sea. And therefore, where a ship was overpowered and plundered on the high seas by pirates, it was held that the owners of the ship were

<sup>1</sup> Wardell v. Mourillyan, 693.

<sup>2</sup> Syeds v. Hay, 4 T. R. 260.

<sup>3</sup> Per Buller J. 5 T. R. 397.

<sup>4</sup> Catley v. Wintringham, Peake's N. P. C. 150.

not answerable to the owners of the goods for their value<sup>1</sup>. But if, while a ship is in a port or river within the body of a county, the crew are overpowered, and the goods stolen, the owners will be responsible for the loss<sup>2</sup>.

A loss happening to a cargo from lightning is within the exception of damages arising from the act of God. And by the statute 26 Geo. III. c. 86. s. 2. the owner of any ship or vessel is indemnified from all responsibility for any loss or damage which may happen to any goods or merchandize on board his vessel by reason of any fire happening on board the same.

A loss or damage to be considered as happening from the act of God must be immediate; if remote, the owner's responsibility is not removed. And therefore, where a ship entering the harbour of Hull struck against the masts of another vessel which had sunk there, the owner of the vessel was held liable for the goods which had been spoiled by the water; although it appeared in evidence that the bank on which vessels used to lie in safety at the entrance of the harbour had been partly swept away by a great flood a short time before the misfortune in question, and upon which, had it been in its former situation, the defendant's vessel would have remained in safety<sup>3</sup>.

So where, in a voyage from Hull to Gainsborough, a vessel was sunk in the river Trent by striking against the anchor of another vessel, which anchor lay under water and without a buoy, the owners were held responsible for the damage done to the goods on board<sup>4</sup>.

So if a ship perish in consequence of striking against a

<sup>1</sup> *Pickering v. Barciay*, 2 Rol. Abr. 248. *Burton v. Wolliford*, Comb. 56.

<sup>2</sup> *Morse v. Slue*, 1 Vent. 190.

<sup>3</sup> *Smith v. Shepherd*, Summer York Assizes, 1795, reported in *Abbott's Merchant Shipping*, 249.

<sup>4</sup> *Proprietors of the Trent and Mersey Navigation*, East. T. 1785, B. R.

rock or shallow, which is known to the master, the owner of the vessel will be liable for any loss or damage happening to the goods; unless the ship was driven upon such rock or shallow by adverse winds or tempest, or that the shallow was occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety<sup>1</sup>.

*5. Of the Limitation of the Responsibility of the Owner and Master.*

By the statute 7 Geo. II. c. 15. s. 1. which was enacted for ascertaining and settling how far owners of ships and vessels should be answerable for any gold, silver, diamonds, jewels, precious stones, or other goods or merchandizes, which shall be made away with by the masters or mariners, without the privity of the owners thereof, it is provided, that no owner of any ship or vessel shall be responsible for any loss or damage occasioned by reason of any embezzlement, secreting, or making away with by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize, on board the same, without the privity of such owner, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage wherein such embezzlement, secreting, or making away with as aforesaid, or other malversation of the master or mariners, shall be committed.

But as this statute relieved the responsibility of the owners only in the case of a robbery committed by the master and mariners, and that they still remained liable for robberies committed by persons not belonging to the ship; it was enacted by the statute 26 Geo. III. c. 86. s. 2., which contains the same provisions of the preceding act, that the

<sup>1</sup> Rogers, not. 55.

same limits shall be fixed to the responsibility of the owners in the case of robbery, although the master or mariners shall not be in any wise concerned in or privy to such robbery, embezzlement, secreting, or making away with. And by the third section of the same statute it is enacted, that no master or owner of any ship or vessel shall be responsible for any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones shipped on board any vessel, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master or owner of such ship or vessel, the true nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones.

### 3. OF THE STOPPAGE OF GOODS IN TRANSITU.

When goods have been consigned upon credit, and the consignee has become a bankrupt or insolvent before the delivery of the goods, the law, in order to prevent the loss that would happen to the consignor by the delivery of them, permits him, in many cases, to resume the possession, by countermanding the delivery, and, before or at their arrival at the place of destination, to cause them to be delivered to himself, or to some other person for his use. This right which the consignor has, upon the insolvency of the consignee, and, if the full price has not been paid, of resuming the possession of his goods during their transit to the place of destination, is technically called stoppage in transitu<sup>1</sup>.

This practice, which is founded on principles of natural justice and equity, was first sanctioned and established in the Court of Chancery<sup>2</sup>, and has been subsequently re-

<sup>1</sup> Abbott on Merchant Shipping, 351. 2 Selw. 1171.

<sup>2</sup> 2 Vern, 203. 1 Atk. 245. Amb. 599.



recognised and adopted by a variety of decisions in the courts of law. And to entitle the consignor to this right an actual possession of the goods is not necessary to be obtained; a constructive possession will be sufficient, such as a claim, or the like, by his agent<sup>1</sup>.

The right of the vendor to stop goods in transitu in case of the insolvency of the vendee is, in the language of Lord Kenyon, a kind of equitable lien adopted by the law for the purposes of substantial justice, and does not proceed on the ground of rescinding the contract. Hence the circumstance of having paid in part for the goods will not defeat the vendor's right of stopping them in transitu; for the vendor has a right to retake them, unless the full price of the goods has been paid; and the only operation of a partial payment is to diminish the lien pro tanto<sup>2</sup>.

But notwithstanding the consignor may, while the goods are in transitu, revest the property in the goods again in himself, which had passed to another, by putting them in a course of conveyance; yet by the general law of England, when goods have been delivered into the actual or constructive possession of the buyer, they cannot be reclaimed by the vendor; the property has completely passed from him, and vested in the vendee, against whom the only remedy is an action to recover the price<sup>3</sup>.

The law of England, however, (though, as between its own subjects, the transfer of property is considered to be complete by sale and delivery alone, even without payment or security for the price,) will lend its aid to carry into effect the more enlarged rule of equity, which exists in another country, upon a transaction taking place there. Thus, where a ship was chartered by the consignee, and a delivery was made on board the same in Russia, and by a

<sup>1</sup> Per Lord Kenyon in *Northey v. Field*, 2 Esp. N. P. C. 613.

<sup>2</sup> *Hodgson v. Loy*, 7 T. R. 440.

<sup>3</sup> 1 East's Rep. 522. 3 Ibid. 396.

law of that country the owner of goods, in case of the bankruptcy of the vendee, is entitled to sue out process to retake his goods, and retain them till payment; and the owners, hearing of the insolvency of the vendee, applied to the captain on board whose ship the goods had been delivered, to sign the bills of lading to their order, which he complied with: it was held that this was a substantial compliance with such law, and that the captain on his arrival in England was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee who had become a bankrupt <sup>1</sup>.

We shall now proceed to inquire by whom and under what circumstances this right may be exercised; and for this purpose shall consider, 1st. Under what circumstances goods are deemed to be in transitu. 2dly. When the transitus shall be considered as determined. 3dly. By whom this right may be exercised. 4thly. By what acts the right of the consignor may be defeated during the transit.

First, then, under what circumstances goods are deemed to be in transitu.

As under what circumstances the transitus shall be considered as continuing, it is a general rule, that the transitus in goods continues in all cases until there has been an actual delivery to the vendee. And therefore goods continue liable to the vendor's right of stoppage in transitu, not only while they remain in the possession of the carrier, whether by land or water, but also in any place connected with the transmission and delivery of them to the consignee <sup>2</sup>.

So if goods consigned to the vendee are delivered to a wharfinger, who receives them on the part of the vendee to be forwarded to him accordingly; on the insolvency of the

<sup>1</sup> Inglis and others v. Underwood, 1 East's Rep. 515.

<sup>2</sup> Stokes v. La Riviere, London Sitt. after Mich. 1784, cited in 3 T. R. 466. and in 3 East's Rep. 397. Hunter and another v. Beale, London Sitt. after T. 1785, cited in 3 T. R. 466.

vendee, they are subject to be stopped by the consignor in the hands of the wharfinger<sup>1</sup>: and the law is the same in case of delivery to a packer<sup>2</sup>; even though the carrier, wharfinger, or packer, should have been appointed by the vendee<sup>3</sup>.

Before the case of *Inglis and Underwood*, which we have already mentioned, a distinction was taken between goods imported in a general ship, and a ship chartered by the consignee for a particular voyage, as to the consignor's right to stop in transitu; it being supposed that the right of stopping in transitu did not apply to the case of goods shipped on board a vessel wholly chartered by the consignee. By the case, however, of *Bohtlingk v. Inglis*<sup>4</sup>, and which arose out of the same transaction, it was held, that the delivery of the goods on board a ship wholly chartered by the consignee does not, in case of the insolvency of the vendee, preclude the right of the consignor to stop the goods while in transitu on board such ship, before actual delivery, any more than if they had been delivered on board a general ship for the same purpose.

To deprive the consignor of his right to stop in transitu, the ship, on board of which a cargo is consigned, must have completed her voyage before the transitus can be completely at an end. And therefore, where a ship which ought to have performed quarantine came into port without doing so, and the assignees of the consignee, who had received the bill of lading, but had become bankrupt, went on board and took possession of the cargo as part of the bankrupt's estate, but the ship being afterwards ordered out of port to perform quarantine, an agent of the consignor,

<sup>1</sup> *Mills and another v. Ball*, 2 Bos. and Pul. 457.

<sup>2</sup> *Hunt and others v. Ward*, cited in 3 T. R. 467.

<sup>3</sup> *Smith v. Goss*, 1 Camp. N. P. C. 282. *Ellis v. Hunt*, 3 T. R. 469. *Hodgson and others v. Loy*, 7 T. R. 440.

<sup>4</sup> 3 East's Rep. 381.

during

during the performance of quarantine, claimed the goods on behalf of his principal; it was held that the right of the consignor to stop the goods in transitu existed when the claim was made on his behalf, because the voyage was not at an end till the performance of quarantine<sup>1</sup>.

When goods consigned, but the duties not being paid, are lodged in the King's stores, the consignor may stop them in transitu; if he claims them before they are actually sold for the payment of the duties; or, if sold, he is entitled to the proceeds<sup>2</sup>.

2. When the transitus shall be considered as determined.

When the transitus shall be considered as complete, and the delivery of such a nature as to divest the vendor's right of stepping in transitu, will appear from the following cases.

In a case of goods sent by a waggon, which, on their arrival in London at the inn where the waggon usually put up, were attached by process of foreign attachment, at the suit of a creditor of the vendee, and which while remaining in that situation at the inn were claimed and marked by the assignee of the vendee, who had become a bankrupt before their arrival in London; it was held that the vendor could not afterwards countermand the delivery; for, from the impracticability of removing the goods on account of the attachment, on their arrival at the inn they had attained their ulterior destination, and were no longer in transitu; and that the assignee, who was clothed with the rights of the bankrupt, had, by putting his mark upon them, done what was equivalent to taking actual possession<sup>3</sup>.

Where a part of the goods sold by an entire contract has

<sup>1</sup> *Holst v. Pownall and Spencer*, 1 Esp. N. P. C. 240.

<sup>2</sup> *Northey and another v. Field*, 2 *Ibid.* 613.

<sup>3</sup> *Ellis v. Hunt*, 3 T. R. 161.

come to the actual possession of the vendee, the vendor's right to countermand is wholly at an end, and cannot be exercised over the residue which may not have been delivered<sup>1</sup>.

Delivery of goods on board a ship wholly chartered by the consignee, will not, as we have seen, divest the consignor's right to stop the goods while in the hands of the carrier<sup>2</sup>. But where a ship had been hired by the consignee for a term of years, who during that time had the entire disposition and control over such ship, having fitted, victualled, and manned her, goods delivered on his account on board, on a mercantile adventure, cannot be stopped in transitu; the consignee being in such case the owner of the ship pro tempore, and the delivery of the goods on board thereof being equivalent to a delivery into the consignee's warehouse<sup>3</sup>.

From the cases of *Mills v. Ball*, and *Hunt v. Ward*, we have seen that where goods have been delivered to a packer, or wharfinger, to be forwarded to the consignee, and the packer or wharfinger may be considered merely as a middle man, the transit is not at an end by such delivery. But when the consignee uses the warehouse of the wharfinger, packer, &c. as his own, and has the goods sent thither as the place of their ulterior destination, the transitus will be considered as at an end when the goods have arrived at such warehouse; and consequently the right of stoppage in transitu has ceased<sup>4</sup>.

Where goods have so far arrived at the end of their journey, that they wait for fresh orders from the purchaser to put them again in motion; as where goods ordered for the

<sup>1</sup> *Slubey and another v. Heyward and others*, 2 Hen. Bl. 504. *Hammond and others v. Anderson*, 1 Bos. and Pul. N. R. 69.

<sup>2</sup> *Bohlingk v. Inglis*, 3 East's Rep. 381.

<sup>3</sup> *Fowler and another v. M'Faggart and others*, cited in 7 T. R. 442. 1 East's Rep. 524. 3 Ibid. 386.

<sup>4</sup> *Scott and others v. Pettit*, 3 Bos. and Pul. 459. *Leed and another v. Wright*, 3 Ibid. 320.



purpose of being sent abroad, have' come to the hands of an agent of the vendee, in whose hands they were to remain until he received orders as to their ulterior destination; the right to stop in transitu is determined on the arrival of the goods at the hands of such agent. Thus,

Where A. and B., traders in London, were in the course of ordering goods of the defendants, cotton manufacturers at Manchester, to be sent to M. and Co. at Hull, for the purpose of afterwards being sent to the correspondents of A. and B. at Hamburg; it was held that, as between buyer and seller, the right of the defendants to stop while in transitu was at an end when the goods came to the possession of M. and Co. at Hull; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull, were to receive a new direction from the vendees<sup>1</sup>.

Lord, Ellenborough in giving judgement in this case said, (adverting to the case of Hunter and Beale before mentioned,) I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee, *i. e.* when they arrived at the innkeeper's, and were afterwards, under the immediate orders of the the vendee, thence actually launched again in a course of conveyance from him, in their way to Boston; being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete; and the transitus for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination.

The facts of the case of Hunter and Beale were shortly these: A bale of cloth was sent by Messrs. Steers and Co. of Wakefield to the defendant, who was an innkeeper, di-

<sup>1</sup> Dixon and others v. Baldwen, 5 East's Rep. 175.

rected to the vendees, (Blanchard and Lewis,) to whom the defendant's book-keeper gave notice that a bale of cloth had arrived for them. Blanchard and Lewis gave orders to the defendant's book-keeper to send the bale down to Galley Quay, in order to ship it on board the *Union*, to be carried to Boston. The defendant accordingly sent the bale to the quay; but it arriving too late to be shipped, was sent back, and continued in the defendant's custody for the purpose of being sent by another ship, but before this could take place the vendees were declared bankrupts. It was held by Lord Mansfield, that the vendor's right of stoppage in transitu was not divested thereby; and that to produce this effect there must be an absolute and actual possession by the vendee: a delivery to a third person to convey to him not being sufficient.

To defeat the right of the vendor to stop in transitu, it is not necessary that the goods should be delivered at the vendee's place of abode; it is sufficient if they come into his possession, and that he has exercised any act of ownership over them (as by tasting and sampling them, and paying warehouse rent), though at a place short of their original destination<sup>1</sup>.

So, if after goods are sold, they remain in the warehouse of the vendor, and he receives warehouse rent for them, this amounts to such a delivery of the goods to the vendee, as to put an end to the vendor's right to stop in transitu<sup>2</sup>.

And if the goods have been actually delivered to the consignee, the consignor cannot reclaim them, though the bill of lading was for delivery to the consignor, and was undorsed, and a bill of exchange drawn for the price has been dishonoured. Thus,

The consignor of goods abroad, upon a receipt of orders

<sup>1</sup> *Wright v. Lawes*, 4 Esp. N. P. C. 82.

<sup>2</sup> *Harry and others v. Mangles and others*, 1 Camp. N. P. C. 452.

from a correspondent in England, ships goods on account and at the risk of the consignee, and takes bills of lading from the captain, making the goods deliverable to the consignor's own order, and transmits one of such bills unindorsed with the invoice inclosed in a letter to the consignee, informing him that he had drawn upon him for the amount, which he doubted not would meet due honour and close the account; and the consignor, by way of precaution, also sent another bill of lading indorsed to his own agent. Held, that upon the shipment on account and at the risk of the consignee, the property in the goods vested in him, subject only to be divested by the consignor's stopping them while in transitu; and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his unindorsed bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority by the shipper, and however answerable the captain might be to the shipper on that account<sup>1</sup>.

3. By whom the right of stopping in transitu may be exercised, and under what circumstances.

To entitle any one to exercise this right, he must stand in the relation of vendor to the bankrupt; and therefore a mere surety for the price of the goods, is not such a vendor 'quoad' the consignee as to exercise the right of stopping in transitu, even though he may be entitled to a commission on the amount of the goods for which he had been security<sup>2</sup>.

But where a correspondent abroad, in pursuance of orders from a merchant in this country, purchases goods on his own credit without naming the trader here, and ships to him at the original price, charging only his commission, the correspondent abroad, in case of the insolvency of the

<sup>1</sup> *Coxe v. Harder*, 4 East's Rep. 211.

<sup>2</sup> *Siffken and another v. Wray*, 6 East's Rep. 311.

consignee,

consignee, is to be considered as the vendor for the purpose of stopping the goods in transitu, for there was no privity between the original owner of the goods and the bankrupt <sup>1</sup>.

So also is a person who consigns goods to be sold on the joint account of himself and the consignee <sup>2</sup>.

Where goods are consigned in pursuance of an agreement between the consignor and third persons, to be applied in the execution of a certain trust, as to indemnify against acceptances, or the like; on the failure of the consignee in trust, the consignor cannot countermand the delivery, while the trust and object of the consignment remain unsatisfied <sup>3</sup>.

Neither can the consignor repossess himself of goods during their transit, which have been sent by order of the consignee, on his account and at his risk, and to be paid for at the expiration of a limited credit, or by bills at a given date, the consignee being willing to accept the bills and remaining solvent <sup>4</sup>.

But in case of the failure of the consignee, a payment by bills for the amount of the goods, and accepted before his bankruptcy, will not defeat the consignor's right of repossessing himself of the goods during their transit, although at the time of such repossession the bills were not due; for though such bills may be proved under the commission against the consignee, it will amount but to a partial payment <sup>5</sup>.

So where the consignor has a right to stop goods in transitu, such right is not affected where a part of the price of the goods has been paid by the consignee; for part payment only diminishes the vendor's lien, pro tanto, on the goods detained <sup>6</sup>.

<sup>1</sup> Peize and another v. Wray, 3 East's Rep. 93.

<sup>2</sup> Newson and another v. Thornton and another, 6 Ibid. 17.

<sup>3</sup> Haille v. Smith and another, 1 Bos. and Pul. 563.

<sup>4</sup> Wallis v. Montgomery, 3 East's Rep. 584.

<sup>5</sup> Peize and another v. Wray, 3 Ibid. 93.

<sup>6</sup> Hodgson and others v. Loy, 7 T. R. 410.

Nor is the right of the consignor to stop in transitu affected by any claim made upon the goods in their transit by a creditor of the consignee, as where the goods had been attached by process of foreign attachment at the suit of such creditor; for the vendor's right of intercepting the goods, being the elder and preferable lien, cannot be superseded by the attachment<sup>1</sup>.

This right of stoppage in transitu can only be exercised where the relation of vendor and vendee subsists between the consignor and consignee; it does not belong to a person who has only a lien upon the goods without any property in them. And therefore if a person, who by local custom has a lien for his general balance, or is entitled to retain the particular goods until his demand for rendering them merchantable is paid, parts with the goods in pursuance of the orders of his employer, he cannot countermand the delivery; for his lien and right to retain the goods only continue while they are in his possession, and the moment he parts with the possession, in pursuance of the order and on the account of his employer, his lien ceases, and consequently the right of stopping them in transitu<sup>2</sup>.

Neither is this right of the consignor defeated by an usage for carriers to retain goods as a security for the general balance of account due to them by the consignee; but the consignee will be entitled to reclaim them out of their hands, on payment of the price of the carriage of the particular goods, and a tender of indemnification to them<sup>3</sup>.

Nor will a similar usage, when the carriage is to be paid by the consignor, authorize the carrier to detain goods from the consignee who has paid the price for them<sup>4</sup>.

With respect to the legality of the consignee's re-delivery

<sup>1</sup> *Smith v. Goss*, 1 Camp. N. P. C. 282. <sup>2</sup> *Sweet v. Pym*, 1 East's Rep. 4.

<sup>3</sup> *Oppenheim v. Russel*, 3 Bos. and Pul. 42.

<sup>4</sup> *Buller v. Woolcot*, 2 Bos. and Pul. N. R. 64.



very of the goods consigned, in case of bankruptcy, to the consignor, the cases on this point seem at variance. In order to divest the property of goods in transitu out of the consignee, the act of repossession must be adverse on the part of the consignor against the consignee; an amicable agreement between them will not have that effect in case of the failure of the latter. In the case of *Siffken and Wray*<sup>1</sup>, where a consignee after an act of bankruptcy delivered up the bills of lading to his agent upon his undertaking to apply the proceeds of the goods in discharge of bills of exchange drawn for the price, and he accordingly took possession of the goods by the consent of the vendee, who had become a bankrupt; it was held that he could not retain them against the assignees of the bankrupt, although the original consignor approved of the arrangement, there being no adverse stopping in transitu. But in the case of *Mills v. Ball*<sup>2</sup>, where the consignee of goods being insolvent, and having committed an act of bankruptcy, informed the consignor of his circumstances, and refused to receive the goods; in consequence of which the consignor repossessed himself of the goods whilst in transitu; it was held that such repossession was valid, and that the information given by the consignee was not an undue preference given by the bankrupt to the consignor over the rest of his creditors.

The distinction between these cases, Mr. Ross observes in his *Law of Vendors and Purchasers*, p. 214, is very fine spun. “In *Siffken v. Wray*, the possession of the consignor was obtained *by the act of the bankrupt*, who delivered up the bill of lading, without which (for the agent had no duplicate) the goods could not have been stopped: whereas in the last case the stoppage was only effected *through the means of the bankrupt*, as by his giving notice.” It is remarkable, that in the case of *Mills v. Ball*, Mr. Justice

<sup>1</sup> 6 East's Rep. 371.

<sup>2</sup> 2 Bos. and Pul. 457.

Rooke said, "In what manner the information was obtained can make no difference."

Where the vendors hold possession of the goods upon a claim of right to stop them in transitu, though in point of fact at the time of the seizure the transitus is at an end, it is competent to the vendee, though insolvent, but who had not at the time committed an act of bankruptcy, to give up such goods, provided the delivery is *bonâ fide*, and not from any motive of voluntary and undue preference; and the fairness of the transaction may be evidenced by the vendee, having called a meeting of his creditors, by whose advice he was encouraged to deliver up the goods; for until an act of bankruptcy the *jus disponendi* over goods remains by law with the trader, unless, in contemplation of bankruptcy, he exercise it by way of a voluntary and fraudulent preference of a particular creditor<sup>1</sup>.

Lastly, we have to consider, by what acts the right of the consignor may be defeated during the transit.

In the consideration of this division of our subject, we shall have to inquire how far the negotiation of the bill of lading may tend to defeat the right of stopping in transitu. And for this purpose we shall first advert to the different forms in common use.

Sometimes a bill of lading is made for delivery to the consignor by name, or assigns; sometimes to order, or assigns, not naming any person; and at other times to the consignee by name, or assigns. In the two first cases, the consignor either transmits it without any indorsement, or indorses his own name generally upon it, without mentioning any other person; or he indorses it specially for delivery to a person named by the indorsement<sup>2</sup>.

<sup>1</sup> *Dixon and others v. Baldwin and another*, 5 East's R. 175.

<sup>2</sup> *Abbott on Merchant Shipping*, 365.

The mere possession of a bill of lading, made for delivery to the consignor, and not indorsed by him, will not authorize the holder to dispose of the goods. But on the other hand, if the bill of lading be originally made for delivery to the consignee; or being made for delivery to the consignor or assigns, or to order or assigns, be indorsed by the consignor, either to a third person by name, or generally without designating any person; in both cases the consignee named in the bill of lading, and holding it indorsed in blank, has authority to transfer his property in the goods<sup>1</sup>.

In commercial transactions it is usual for the consignee, having received the bill of lading, to sell the goods, or to raise money upon them, before their arrival, and indorse and deliver over the bill of lading to the vendee, by which indorsement and delivery the property in the goods is transferred to such other person<sup>2</sup>.

This practice of assigning bills of lading by the consignee to a third person, who may be totally ignorant of the nature and terms of the consignment, and may not know that the consignee is not absolutely entitled to receive and dispose of the goods, has given rise to a very important question of law, as to the right of the consignor to countermand the delivery as between him and the person to whom the assignment has been made, without any fraud or collusion<sup>3</sup>.

The earliest mention of this subject in our law books, Mr. Abbott observes, is in the case of *Evans v. Marlett*<sup>4</sup>, in which Holt, C. J. said, "the consignee of a bill of lading has such a property that he may assign it over." But in this case, as well as in the subsequent ones<sup>5</sup>, the question

<sup>1</sup> Abbott on Merchant Shipping, 366.

<sup>2</sup> Vide 5 T. R. 685. and 1 Bos. and Pul. 563.

<sup>3</sup> Abbott on Merchant Shipping, 367.

<sup>4</sup> 1 Ld. Raym. 271.

<sup>5</sup> *Appleby v. Pollock*, Abbott, 368. *Wright v. Campbell*, 4 Bur. 2046.  
<sup>1</sup> Bl. Rep. 628. S. C. and *Caldwell v. Ball*, 1 T. R. 205.

upon the effect of such an assignment not being properly before the Court, there appears no direct evidence of the legality of the transfer, until the case of *Lickbarrow and another v. Mason and others* reported in 2 T. R. 63. In that case it was decided, that a bill of lading is a negotiable and transferable instrument, by the consignee's indorsing his name on it, and delivering or transmitting the same to the person to whom it is indorsed; and that by an assignment made by the consignee, for a valuable consideration, where the transaction was *bonâ fide*, and the assignee has no notice that the goods are not paid for, the property is absolutely transferred to the assignee, and that the consignor is by such assignment deprived of the right to stop in transitu, which as against the original consignee he might have exercised.

So the mere circumstance of the indorsee's knowledge, at the time the bill of lading was indorsed and delivered to him, that the consignor had not received payment in money for his goods, but had taken the consignee's acceptances, payable at a future day not then arrived, is not sufficient to invalidate the title of the indorsee, if the transaction was *bonâ fide*, and the assignment was made for a valuable consideration <sup>1</sup>.

The legal title, however, of the indorsee of a bill of lading may be defeated on the ground of fraud, as between him and the consignor, who in such case may repossess himself of the goods <sup>2</sup>.

To enable a consignee to assign a bill of lading, an indorsement and delivery must have been made to him. There may, however, exist special circumstances which may be tantamount to an indorsement and delivery, which may en-

<sup>1</sup> *Cuming v. Brown*, 9 East's Rep. 506.

<sup>2</sup> *Wright and another v. Campbell and another*, 4 Bar. 2046. *Solomons v. Nissen*, 2 T. R. 674.

able the consignee to do this. As where the consignors sent a bill of lading not indorsed to their factors, but having the names of the factors on the back, and being applied to by them for an indorsement, answered by letter, that if the bill of lading was not indorsed it was a mistake, and they would send an indorsement: held that a letter of this kind was a sufficient transfer of property, and amounted to an indorsement, so as to enable the factors to transfer the property in the goods<sup>1</sup>.

But if there be not such facts, and the bill of lading be for delivery to order or assigns, and transmitted unindorsed, the consignee cannot, by a transfer of the property in the goods to a third person, although such assignment be for a valuable consideration and without fraud, divest the right of the consignor to stop the goods in transitu<sup>2</sup>.

*Of the Dissolution of Contracts for the Carriage of Goods by Water.*

Contracts of this nature may be dissolved either by the voluntary act of the contracting parties, or some extrinsic matter happening after the making of the contract, and before its completion. If before the commencement of a voyage, war or hostilities take place between the state to which the ship or cargo belongs and that to which they are destined, or commerce between them is totally prohibited, the contract for conveyance is at an end, and the owner is not entitled to any damages against the freighter, who has thus been compelled to abandon his agreement<sup>3</sup>. But as the laws of one nation do not give effect to the positive institutions of another inconsistent with its own, if a merchant hire a ship to go to a foreign port, and covenant to furnish

<sup>1</sup> Dick v. Lumsden, Peake's N. P. C. 189.

<sup>2</sup> Nix v. Olive, Guildhall Sitt. after Trin. T. 1805, cited in Abbott on Merchant Shipping, 377.

<sup>3</sup> Abbott's Law of Merchant Ships and Seamen, 406.



a lading there, a prohibition by the government of that country to export the intended articles neither dissolves the contract, nor absolutely excuses a performance of it <sup>1</sup>.

An embargo imposed by the government of the country in whose ports the vessel may happen to be, will not operate as a dissolution of a contract of this nature <sup>2</sup>. But in the case of an embargo imposed by the government of the country of which the merchant is a subject, *in the nature of reprisals and partial hostility* against the country to which the ship belongs, the merchant may put an end to the contract, if the object of the voyage is likely to be defeated by the delay <sup>3</sup>.

#### OF CHARTERPARTIES OF AFFREIGHTMENT.

##### *Of the Nature of a Charterparty.*

The term charterparty is generally understood to be a corruption of the Latin words *charta partita*. It is a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places.

The contract by charterparty is in general mutually obligatory upon each party; they may however by particular clauses render it obligatory upon one, and optional to the other. Thus, if a charterparty is executed, in which it was covenanted, that if the ship should not be arrived at Winyaw, in South Carolina, by the first day of March, that it should be in the option of the merchant either to load the ship on the terms specified, or not, or to refuse entirely, provided that the merchant declared such his intention to the master of the said ship, within forty-eight hours after application; it was held that it was optional to the merchant

<sup>1</sup> *Blight and others v. Page*, Guildhall Sittings after M. T. 1801, cited in 3 Bos. and Pul. 295. n. (a.)

<sup>2</sup> *Hadley v. Clarke*, 8 T. R. 259.

<sup>3</sup> *Touteng v. Hubbard*, 3 Bos. and Pul. 291.

to load or not, if the ship arrived after the first of March, although the master had been unavoidably delayed by reason of contrary winds and bad weather <sup>1</sup>.

If before the departure of a ship there should happen an embargo occasioned by war, reprisals, or otherwise, with the country to which the ship is bound, so that she cannot proceed on her voyage, the charterparty shall be dissolved without damages or charges to either party, and the merchant shall pay the charges of unlading his goods; but if the restraint arises from a difference between the parties themselves, the charterparty shall remain valid in all its points. If the ports of the country to which the ship is bound be only shut, and the vessel stopped for a time, the charterparty will still be valid, and the master and merchant will be reciprocally obliged to wait the opening of such port, without any pretensions for damages on either side. The merchant may, however, unlade his goods during the shutting up of the port, upon condition either to relade them or indemnify the master <sup>2</sup>.

*By whom it may be exercised.*

This instrument may be executed by an agent lawfully authorized on the part of the owner or merchant, who may covenant in his own name for performance by his principal, so as by force of the deed to answer for his principal's default. But if the authority of such agent arises from a power of attorney, then the execution must be in the name of his principal <sup>3</sup>.

*Of the usual Stipulations.*

The usual stipulations on the part of the owner or master are, that the ship shall be tight and staunch, furnished

<sup>1</sup> *Shubrick v. Salmond*, 3 Bur. 1637.

<sup>2</sup> *Beawes's Lex Merc.* 141.

<sup>3</sup> *Wilks v. Back*, 2 East's Rep. 142.

with all necessaries for the intended voyage, ready by a day appointed to receive the cargo, and wait a certain number of days to take it on board. That after lading she shall sail with the first fair wind and opportunity to the destined port (the dangers of the seas excepted), and there deliver the goods to the merchant or his assigns in the same condition they were received on board; and further, that during the course of the voyage the ship shall be kept tight and staunch, and furnished with sufficient men and other necessaries, to the best of the owner's endeavours <sup>1</sup>.

On the other hand, the merchant usually covenants to load and unload the ship within a limited number of days after she shall be ready to receive the cargo, and after arrival at the destined port; and to pay the freight in the manner appointed. It is usual also for each of the parties to bind himself, his heirs and executors, in a pecuniary penalty for the true performance of their respective covenants. Frequently also it is stipulated that the ship shall, if required, wait a further time to load and unload, or to sail with convoy, for which the merchant covenants to pay a daily sum. This delay, and the payment to be made for it, are both called demurrage. Sometimes also particular clauses are introduced in favour of the owners, to take away their responsibility for embezzlement by the master, or other matters, for which they would otherwise be responsible <sup>2</sup>.

#### *Of the Construction of a Charterparty.*

In the construction of charterparties it is a general rule that it should be agreeable to the intention and design of the parties concerned, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. Thus, where it was covenanted that the ship

<sup>1</sup> Abbott's Law of Merchant Ships and Seamen, 191.

<sup>2</sup> *Ibid.*  
should

should sail on the intended voyage with the first fair wind, it was held not to mean the next wind, but such a wind as would enable the vessel to perform the voyage<sup>1</sup>. But if by a delay in the commencement of the voyage the merchant sustains any injury, he will be entitled to a compensation commensurate to his loss<sup>2</sup>.

But although a charterparty is to receive a liberal construction, yet the construction must not be inconsistent with the plain and obvious meaning of the parties interested. And therefore, in an action of covenant for demurrage on a charterparty given "while waiting at Portsmouth for convoy, and discharging her cargo at Barcelona," it was held that demurrage could only be claimed for the time the ship was waiting for convoy at Portsmouth, and discharging her cargo at Barcelona, and not for any delays at other intervening places<sup>3</sup>.

Upon the construction of a charterparty of the East India Company, it has been decided, that the owner is not liable to make satisfaction to the Company for the damage done to goods in the ship by storm<sup>4</sup>.

*When a Charterparty takes its Effect and Operation.*

A charterparty takes its effect and operation from the day of its execution, and not from the day of its date, if different from the day of the delivery, unless the contrary appears<sup>5</sup>.

*Of the Rights and Duty of the Charterer.*

As the hirer of any thing must use it in a lawful manner, and according to the purpose for which it is let, the charterer must not lade any prohibited goods by which the ves-

<sup>1</sup> *Constable v. Cloberie*, Palm. 397.

<sup>2</sup> *Malyne*, 93.

<sup>3</sup> *Marshall v. De la Torre*, 1 Esp. N. P. C. 367.

<sup>4</sup> *Tod v. the East India Company*, Doug. 272.

<sup>5</sup> *Osley v. Hicks*, Cro. Jac. 263.

sel may be subjected to detention or forfeiture <sup>1</sup>. Neither can he, after having laden his goods, insist upon having them relanded, and delivered to him, without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him <sup>2</sup>.

But if either party is not ready by the time appointed for the lading of the ship, the other may seek another ship or cargo, and bring an action to recover the damages he has sustained <sup>3</sup>. And if the freighter has not sufficient goods of his own, he may take in the goods of other persons, or may wholly underlet the ship.

If a person freight a ship at 48*l.* per month, and afterwards agrees to allow certain merchants to lade the ship at 9*l.* per ton, the owner, in the event of the freighter's bankruptcy, cannot recover of the merchants any more than they had engaged to pay the freighter <sup>4</sup>.

In general, in case of affreightment by charterparty, the command of the ship is reserved to the owners or the master appointed by them, and therefore the person freighting or lading has not the power of detaining the ship beyond the stipulated time, or employing it in any other than the stipulated service. But by the charterparties under which ships are freighted to the East India Company, the command and disposal of the ship is reserved to them, and the master, although appointed by the owners, is bound to obey the orders of the Company at home, and of their factors and servants abroad; and it is always stipulated that nothing shall be paid by the Company for freight or demurrage, unless the ship returns home in safety. Yet if the Company detain a ship so long in India that she becomes unfit for the voyage; or if they employ a ship in a service not warranted

<sup>1</sup> Roccus, not. 45.

<sup>3</sup> Beawes's *Lex Merc.* 134.

<sup>2</sup> 2 Eq. Ca. Abr. 98.

<sup>4</sup> Paul v. Birch, 2 Atk. 621.



by the charterparty, and without the knowledge or consent of the owners, and it is lost, the owners will be entitled to a proper allowance for the actual and probable earnings and the value of the ship <sup>1</sup>.

As this Company are by their charterparties warranted in employing their chartered ships in trade, warfare, or on any other service whatsoever, it has been decided that a ship of that description was still under the charterparty, though alterations were ordered to be made in her upper works by the Company, to enable her to carry a larger number of guns, &c. than her stipulated force; and though a king's officer assumed the command of her, and hoisted the king's broad pendant on board <sup>2</sup>.

#### OF DEMURRAGE.

The payment of demurrage, which is an allowance stipulated to be made while a ship is waiting for convoy or to receive a cargo, ceases, in the first case, as soon as the convoy is ready to depart; and, in the second, as soon as the ship is fully laden and the necessary clearances are obtained; although the ship may in either case happen to be further detained by adverse winds or tempestuous weather. And if the ship has once set sail and departed, but is afterwards driven back into port, the claim of demurrage is not thereby revived <sup>3</sup>.

By the custom of the merchants of London, the word "days" used alone in a clause of demurrage, without the annexation of the words "working" or "running," does not comprehend Sundays or holidays <sup>4</sup>.

<sup>1</sup> *Edwin and others v. the East India Company*, 2 Vern. 210. *Lewin and others v. the East India Company*, Peake, N. P. C. 241.

<sup>2</sup> *Dobree and others v. the East India Company*, 12 East's Rep. 290.

<sup>3</sup> *Lannay v. Werry*, 2 Bro. P. C. 60. *Jamieson v. Laurie*, 6 Ibid. 474.

<sup>4</sup> *Cochran v. Retbergh et al.* 3 Esp. N. P. C. 121.

## OF BILLS OF LADING.

The difference between a bill of lading and a charter-party is, that the first is required and given for a single article or more laden on board a ship which has sundry merchandize shipped on sundry accounts; the latter is a contract for the whole ship. Bills of lading ought to be signed by the master within twenty-four hours after the delivery of the goods on board. And upon the delivery of the goods, the master, or other person officiating for him in his absence, is to give a common receipt for them, which is to be delivered up, upon the master's signing the bills of lading<sup>1</sup>.

Upon delivering the goods at the port of destination to the shipper's factors or assigns, the giving up of the bill of lading sent to the factor or assigns is not a sufficient discharge, but the master must insist upon a receipt<sup>2</sup>.

As the transfer of property by assignment and indorsement of a bill of lading is intimately connected with the right of the consignor to stop in transitu, the law concerning it will be found under that head.

## OF FREIGHT.

Freight is the sum agreed on for the hire of a ship, entirely or in part, for the carriage of goods from one port to another, or to many ports; and must be paid in preference to all other debts<sup>3</sup>.

If a merchant freights a ship, but declines to lade her in pursuance of his agreement, or if before the commencement, or during the course of the voyage, he withdraws his goods from the ship, or having hired a ship to go to a distant port, and engaged to furnish a cargo homeward, fails

<sup>1</sup> Beawes's *Lex Merc.* 142.<sup>2</sup> *Ibid.*<sup>3</sup> *Ibid.* 138.

to do so, whereby the ship is forced to return in ballast, by the law of England the owners are entitled to a compensation, to be ascertained, in case of disagreement, by a jury, upon a consideration of all the circumstances of the case, and of the real injury sustained by the owners<sup>1</sup>.

Unless a contract for the conveyance of merchandize is completely performed by the delivery of the goods at the place of destination, the merchant will not be subject to the payment of any freight whatever. But an interruption, as in the case of capture and recapture, of the regular course of the voyage, not arising from any fault of the owner, will not deprive him of his freight, if the ship afterwards proceeds with the cargo to the place of destination<sup>2</sup>.

So if part of the cargo be thrown overboard for the preservation of the ship and the remainder of the goods, or if the master is compelled to sell a part of the cargo for victuals or repairs; in these cases, if the ship afterwards reach the place of destination, the owners will be entitled to the value of the freight for the goods so thrown overboard or sold; as in the first case they must answer to the merchant for the value of the goods thrown overboard by way of general average; and, in the second, must pay him the price which the goods would have fetched at the place of destination<sup>3</sup>.

As to the payment of freight for the conveyance of living animals, whether men or cattle, which may die during the voyage, the following distinction has been taken: if the agreement be to pay freight for lading them, the owners will be entitled to freight notwithstanding their death; but if for transporting them, then no freight is due for those

<sup>1</sup> See *Westland v. Robinson*, cited 2 Vern. 212.

<sup>2</sup> *The Racehorse*, 3 Rob. Adm. Rep. 101.

<sup>3</sup> *Roccus*, not. 89. Ord. of Wisbuy, art. 35.

that die on the voyage. No freight however is due for an infant born during the voyage <sup>1</sup>.

In the case of a charterparty, if the stipulated payment is a gross sum for an entire ship, or an entire part of a ship, for the whole voyage, the gross sum will be payable although the merchant may not have fully laden the ship <sup>2</sup>. But if a merchant hires an entire ship, the burthen of which is expressed in the charterparty, and covenants to pay a certain sum for every ton, &c. of goods which he shall lade on board, the owners will only be entitled to payment for the quantity of goods actually shipped, unless a complete lading had been agreed to be furnished <sup>3</sup>.

A ship was let to freight for the voyage, to take out a small cargo of lead to Petersburg, and to bring home a return cargo, for which freight was to be paid at eleven guineas a ton for the whole ship's admeasurement. If from political circumstances she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum, less than the amount of the freight per ton. The ship being prevented from discharging, and the freighter supplying no home-cargo, the master took in goods on freight, and brought them home together with the lead. The Court held that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned <sup>4</sup>.

In general, the chance of the duration of the voyage falls upon the owner, unless the merchant stipulates to pay a certain sum for every month, week, or other portion of the voyage. If no time is fixed for the commencement of the computation, it will begin from the day on which the ship

<sup>1</sup> Molloy. b. 2. c. 4. s. 8.

<sup>2</sup> Roccus, not. 72.

<sup>3</sup> Lady James v. E. I. Company, Guildhall Sit. after Mich. T. 1789.

<sup>4</sup> Bell v. Puller, 2 Taunt. 285.

breaks ground, and will continue during the whole course of the voyage, and during all unavoidable delays, not occasioned by capture, or such circumstances as entitle to general average or contribution.

If a neutral vessel, having on board enemy's goods, is taken, the captor is to pay the whole freight, although it has not been wholly earned by the completion of the voyage<sup>1</sup>, unless the goods so captured are contraband according to the law of nations, such as naval stores, &c; and then no freight is to be paid by the captor: and it makes no difference whether the master does or does not know the quality of the goods<sup>2</sup>. Neither is any freight to be paid by the captor, if a neutral ship is employed in a direct trade between the colonies and the mother country of the enemy<sup>3</sup>; or in the coasting trade, between one port and another of a belligerent power<sup>4</sup>; or in carrying the goods, even of neutrals, directly from the mother country of an enemy to its colony<sup>5</sup>; or from one enemy to the colony of another enemy allied in the war<sup>6</sup>; if these trades were not, in time of peace, open to the neutral nation whose ship is so employed. But freight is to be paid to the owners of a neutral ship employed in carrying the goods of an enemy from the port of one enemy to the port of another nation equally hostile to the country of the captors<sup>7</sup>.

If a ship is carried by the recaptors into a port short of the port of destination, and there restored, the owners will be entitled to the whole freight, subject only to the deduction of salvage upon the amount of it, notwithstanding a restitution of the cargo has not taken place; provided the

<sup>1</sup> The Copenhagen, 1 Rob. Adm. Rep. 289.

<sup>2</sup> The Mercurius, Rob. Adm. Rep. 288.

<sup>3</sup> The Rebecca, 2 Ibid. 101.

<sup>4</sup> The Emanuel, 1 Ibid. 296.

<sup>5</sup> The Immanuel, 2 Rob. Adm. Rep. 186.

<sup>6</sup> The Rose, Ibid. 206.

<sup>7</sup> The Wilhelmina, 2 Ibid. in notis.



master has waited a reasonable time before departure for the result of a claim of restitution <sup>1</sup>.

If an enemy's vessel, having on board neutral goods, be taken, and the captor conduct the ship and cargo to the original port of destination, having performed the contract of the master, he is, upon restitution of the goods to the consignee, entitled to the freight, on the same principle on which he would be held not to be entitled, where he does not proceed, and perform the original voyage <sup>2</sup>.

Where goods have been so deteriorated during the course of the voyage, as to be of no value, it is undecided, whether the merchant is bound to receive them, or is at liberty to abandon them, and by so doing discharge himself from the freight. If the deterioration has proceeded from the fault of the master or mariners, the merchant is entitled to a compensation, and may recover it in an action against the owners or master, provided he has not received the goods <sup>3</sup>. But if it has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, the merchant must bear the loss and pay the freight. In the case of *Baillie v. Moudigliani* <sup>4</sup>, Lord Mansfield said, the owner of the ship has a lien for freight, but in a total loss, literally so called, no freight is due; in case of a loss total in its nature, with salvage, the merchant may either take the part saved, or abandon. And again, in the case of *Luke and another v. Lyde* <sup>5</sup>, the same judge said, if a freighted ship becomes accidentally disabled on its voyage, without the fault of the master, the master has his option of two things; either to refit it, (if that can be done within convenient time,) or to hire another

<sup>1</sup> *The Racehorse*, 3 Rob. Adm. Rep. 101.

<sup>2</sup> *The Fortuna*, 4 Ibid. 278.

<sup>3</sup> *Milles and others v. Bainbridge and others*, Guildhall, Dec. 20th, 1801.

<sup>4</sup> *Mark's Insurance*, 53.

<sup>5</sup> 2 Bur. 882. 1 Bl. Rep. 190.

ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage ; and so it was determined in the House of Lords in the case of *Lutwidge and How v. Grey et al.* As to the value of the goods, it is nothing to the master of the ship, whether the goods are spoiled or not, provided the freighter takes them ; it is enough if the master has carried them ; for by so doing, he has earned his freight ; and the merchant shall be obliged to take all that is saved, or none : he shall not take some and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons all, he is excused freight ; and he may abandon all, though they are not all lost.

In the case of the ship *York*, which had been chartered by the East India Company, and on her return home from India met with a violent storm off Margate, where she was stranded and sunk under water, the Company were held liable to pay the freight of a quantity of pepper delivered to and received by them, although greatly damaged by the sea water ; and the owners were held not to be answerable for the expense incurred in endeavouring to remove the injury occasioned by the salt water<sup>1</sup>.

A covenant in a charterparty of affreightment, that the owner shall at his expense forthwith make the ship tight and strong, &c. for the intended voyage, and keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service and used her for a certain period. But if the freighter be afterwards delayed or injured by the necessity of repairing her, or if the owner's neglect to repair in the first instance had pre-

<sup>1</sup> *Hotham and others v. the East India Company*, Doug. 272.

cluded the freighter from making any use of the vessel, the freighter has his remedy in damages<sup>1</sup>.

The cases in which an apportionment of freight, or a part only of the sum stipulated for freight, may be claimed, are, first, When the ship has performed the whole voyage, but has brought a part only of the merchant's goods in safety to the place of destination. Secondly, When the ship from any disaster is unable to prosecute and complete the whole voyage, but the master has delivered the goods to the merchant at a place short of the port of destination.

Upon this subject of the apportionment of freight Malyne says<sup>2</sup>, "that if from any disaster the master is unable to prosecute the voyage, he may repair his ship or freight another; but if he is unable, or if he declines to do this, the merchant shall pay freight according to the proportion of the voyage performed. And with this the maritime law conforms<sup>3</sup>.

This rule of the maritime law, which directs the payment of freight according to the proportion of the voyage performed, *pro ratâ itineris peracti*, was recognised and fully adopted in the cases of *Luke and another v. Lyde*; and of *Lutwidge and another v. Grey and another*, before mentioned; in the latter of which Lord Mansfield further observed, 'If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not desire him to do so, the master is still entitled to a proportion, *pro ratâ*, of the former part of the voyage.'

But if a ship, having proceeded but a few days on the voyage, is, from bad weather and becoming leaky, obliged to return, and is there detained by an embargo; it has been

<sup>1</sup> *Havelock v. Geddes*, 10 East's Rep. 555.

<sup>2</sup> P. 98.

<sup>3</sup> See *Abbott's Law of Merchant Ships and Seamen*, p. 295.

held that no freight is due : if any expenses, however, have been incurred by the ship on account of the cargo, they must be paid <sup>1</sup>.

So if the ship is prevented from setting forth on the voyage, no partition of freight *pro ratâ itineris* can be claimed for goods laden on board, even if such prevention arises without the fault of the master ; as where the vessel while waiting for convoy was cut out of the river by the enemy. For freight does not commence until the ship has broken ground and begun the voyage <sup>2</sup>.

So where, under an agreement in a charterparty, the plaintiff let his ship to the defendants on a voyage from Shields to Lisbon, with convoy, the freight to be paid on right delivery of the cargo ; the ship having sailed from Shields with the cargo, and joined convoy at Portsmouth, and after being detained near a month off Lymington, her sailing orders being recalled by the convoy in consequence of the occupation of Portugal by the enemy ; and the defendants having refused to accept the cargo at Portsmouth, to which the ship returned, it was unloaded by the plaintiff after notice to the defendants, and then was sold by consent of both parties without prejudice : held that the plaintiff could not recover freight *pro ratâ* on demurrage <sup>3</sup>.

So where the master of a vessel covenanted with the freighter (*inter alia*) that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery of the cargo agreeably to the bills of lading signed for the same, and to take in a home cargo, and return and make a right and true delivery thereof at London, &c. ; in consideration

<sup>1</sup> The *Isabella Jacobina*, 4 Rob. Adm. Rep. 77.

<sup>2</sup> *Curling v. Long*, 1 Bos. and Pul. 634.

<sup>3</sup> *Liddard v. Lopes and another*, 10 East's Rep. 526.



whereof, the freighter covenanted (inter alia) to load the vessel out and home, and pay certain freight per ton, part before, and the remainder on right and true delivery of the homeward cargo at London: it was held, 1st, That the freighter, having first ordered the master to proceed to Lisbon, in consequence of which the master had taken in goods and signed bills of lading for that port, could not afterwards countermand that order, and order him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon. 2d, That the master having proceeded with the outward cargo to Lisbon under the first order, and brought home a return cargo, and delivered the same to the freighter at London, was entitled to his freight for that voyage, though he had not sailed with the first convoy, the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed under the first order, but a distinct covenant, for the breach of which he was liable in damages. And 3d, That he was entitled to recover such freight as upon a right and true delivery of the cargo, agreeably to the bills of lading, and upon proof of having delivered the goods for which the bills of lading had been signed, though it appeared that the goods had been damaged by the negligence of the master and crew on board, by not ventilating them sufficiently: the party injured having his counter remedy by action for such negligence<sup>1</sup>.

Where a ship is chartered to sail from one port to another, and from thence back to the first, the whole being one entire voyage, no freight will be due if the ship should be lost in the homeward voyage, although the merchant has had the benefit of the outward voyage. But if the outward

<sup>1</sup> Davidson v. Gwynne, 12 East, 581.



and homeward voyage are distinct, freight will be due for the proportion of time employed in the outward voyage<sup>1</sup>.

If a ship freighted to H. is prevented by restraints of princes from arriving, and the consignees direct the master to deliver the cargo at G., and accept it there, he is entitled to freight *pro ratâ itineris*. And if he is prevented by the default of the consignees from delivering the whole cargo there, he will be entitled to freight *pro ratâ* for the part delivered<sup>2</sup>.

And from the same case it seems, if a ship be freighted on a single voyage outwards, and be prevented from delivering her cargo, that she is entitled to freight from the owner of the cargo for bringing it back; as also demurrage from the time of her arrival at the port of loading and notice, till the owner receives the cargo, or the master has had time to discharge it, if abandoned by the owner.

If there is no express stipulation to the contrary, the master is not bound to part with the goods, until his freight is paid. And if, by the regulations of the revenue, the goods are to be landed and put into the king's warehouse, if the duties are not paid, the master may enter them in his own name, and thereby preserve his lien<sup>3</sup>.

If a consignee receives goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay the freight, he by such receipt makes himself debtor for the freight, and may be sued for it<sup>4</sup>. But the master's right to exact payment of the freight from the consignee, does not arise till the delivery is completed or determined<sup>5</sup>.

If a consignee, known as such to the master, sells the goods before they are landed, he and not the buyer is liable

<sup>1</sup> Molloy, b. 2. c. 4. s. 9. Malyne, p. 98. *Mackrell v. Simond and Hankey*, Trin. T. 16 Geo. III. B. R.

<sup>2</sup> *Christy v. Row*, 1 Taunt. 300.

<sup>3</sup> *Abbott*, 276.

<sup>4</sup> *Roberts v. Holt*, 2 Show. 433. *Cock v. Taylor*, 13 East's Rep. 299.

<sup>5</sup> *Christy v. Row*, 1 Taunt. 300.

to be sued for the freight, although the buyer enters the goods at the custom-house in his own name<sup>1</sup>. Neither does such entry of goods at the custom-house, made by a person who is only agent for the consignor, and known to the master to be acting in that character, render such agent liable to be sued for the freight<sup>2</sup>.

#### OF INSURANCE.

Insurance is a contract by which the insurer undertakes, in consideration of a premium, to run the hazard to indemnify the person insured against certain perils or losses, or against some particular event<sup>3</sup>.

The origin of insurance, like that of many other customs, which depend rather upon traditional than written evidence, has occasioned much doubt among the writers upon mercantile law. From a passage in Suetonius<sup>4</sup>, the origin of this contract has been ascribed by Molloy and Malynes to Claudius Cæsar, the fifth emperor of Rome. Other authors have given the honour of it to the Rhodians. But from several concurrent testimonies, it is evident that the invention of marine insurance is of modern date: both Grotius<sup>5</sup> and Bynkershoek<sup>6</sup> expressly declare, that among the ancients this contract was unknown.

##### 1. *Of the Policy.*

The policy, which is the instrument in which the terms of the agreement are set forth, is generally printed, with a few terms superadded in writing, calculated either to contract or confine, or to enlarge or extend the printed language, and thereby to render it subservient to the intention of the

<sup>1</sup> *Artaza v. Smallpiece*, 1 Esp. N. P. C. 23.

<sup>2</sup> *Ward v. Felton*, 1 East's R. 507.

<sup>3</sup> 2 Bl. Com. 458.

<sup>4</sup> *In Vita Tiberii Claudii*, c. 18.

<sup>5</sup> *De Jure B. ac P. lib. ii. c. 12. s. 3.*

<sup>6</sup> *Quæst. Juris Publici*, lib. i. c. 21.

parties to the particular contract<sup>1</sup>. It is not, like most contracts, signed by both parties, but only by the insurer or underwriter<sup>2</sup>.

Policies are of four kinds: 1. An interest policy. 2. A wager policy. 3. An open policy. 4. A valued policy.

1. An interest policy is where the assured has a real, substantial, assignable interest in the thing insured<sup>3</sup>.

2. A wager policy is an insurance founded on an imaginary risk.

3. An open policy is where the value of the thing insured is not inserted in the policy, but must be proved if a loss happens.

4. A valued policy is where the value of the thing insured has been settled by agreement between the parties, and that value inserted in the policy<sup>4</sup>.

After a policy of insurance has been once underwritten, it cannot be altered by either party, either on the ground that the intention of the parties was mistaken, or that the policy had been framed contrary to the real agreement<sup>5</sup>; unless by the consent of the parties<sup>6</sup>; or that there exists some written document to show that the meaning of the parties was mistaken<sup>7</sup>.

### *Of the Requisites of a Policy.*

The essential parts of which a policy is composed are eight.

#### *First, The Name of the Party insured.*

It was formerly the practice to effect policies of insurance in blank, without naming the persons on whose accounts they were made. But this being found both mischievous and inconvenient, by the statute 25 Geo. III. c. 44, it was di-

<sup>1</sup> 3 Bur. 1555. Selw. N. P. 939.

<sup>2</sup> Marshall's Insurance, 190.

<sup>3</sup> Henkle v. The Royal Exchange Assurance Company, 1 Ves. 317.

<sup>4</sup> Bates v. Graham, 2 Salk. 444.

<sup>5</sup> Motteux v. The Gov. and Comp. of the London Assurance, 1 Atk. 545.

<sup>6</sup> Park's Insurance, 1.

<sup>7</sup> Selw. N. P. 940.

rected, that the name of all persons interested, or, if they resided abroad, the name of their agents in this kingdom, should be inserted in the policy. The provisions of this act, however, being found inadequate to the purpose for which it was designed, it was repealed by the 28th Geo. III. c. 56, which enacts, that it shall not be lawful for any person to effect any policy on ships or goods, without first inserting the names or usual style or form of dealing of the parties interested; or of the consignors or consignees of the property insured; or of the persons receiving the order for, or effecting, the policy; or of the persons giving directions to the agent immediately employed to effect the same; and that every policy made contrary to the meaning of the act shall be null and void.

Upon this act it has been held, that it is not necessary, where a policy is effected by an agent, that the name of the agent, or any other description to his name, should be inserted in the policy, *eo nomine*, as agent<sup>1</sup>. And it has also been decided, that a policy effected by a broker, describing himself therein as “agent,” was a sufficient compliance with the requisition of the statute<sup>2</sup>.

*Secondly, The Names of the Ship and Master.*

By the common law and usage of merchants, it seems necessary to insert the name of the ship. But should this be mistaken, the insurance will not be vitiated, provided the identity can be proved, and that there was no fraud<sup>3</sup>.

To avoid any inconvenience which may arise from a mistake in the name of a ship, it is usual to add in the policy, to the name given, these words, “or by whatever other name or names the same ship should be called<sup>4</sup>.”

<sup>1</sup> *De Vignier v. Swanson*, 1 Bos. and Pul. 346, n.

<sup>2</sup> *Bell v. Gibson*, 1 Bos. and Pul. 345.

<sup>3</sup> *Le Mesurier v. Vaughan*, 6 East's R. 581.

<sup>4</sup> *Selfw.* N. P. 944:

*Thirdly,*

*Thirdly, The Subject Matter of the Insurance.*

It must be specified whether the insurance is made upon ships, goods, or merchandises. With respect to goods, there are some kinds of property which do not fall under the general denomination of goods in a policy; and for the loss of which the underwriters are not answerable, unless they are specifically named. Thus goods lashed on deck, the captain's clothes, or the ship's provisions; for none of these things are within a general policy on goods, which means only such goods as are merchantable, and a part of the cargo<sup>1</sup>. So goods stowed on deck have been held not within a general policy on goods, for the risk is greater as to them than as to other goods<sup>2</sup>. But Magens, in his Essay on Insurances<sup>3</sup>, says, that gold and silver, whether coined or uncoined, pearls, and other jewels, may be insured at London and Hamburgh, and several other places, under the general expression of merchandise.

*Fourthly, The Voyage insured.*

The voyage insured must be truly and accurately described in the policy, namely, the time when, and place at which, the risk is to begin, the place of the ship's departure, the place of her destination, and the time when the risk shall end<sup>4</sup>.

On the goods, the risk usually begins from the lading on board the ship, and continues till they are safely landed; on the ship, from her beginning to lade at A. and continues till she arrives at the port of destination, and is there moored in safety twenty-four hours.

From the words of the policy, it is obvious, Mr. Park observes, that insurers are not answerable for any accidents

<sup>1</sup> *Ross v. Thwaite*, Guildhall Sittings after Hil. 16 Geo. III.

<sup>2</sup> *Backhouse v. Ripley*, Sitt. after Mich. 1802, C. P.

<sup>3</sup> Vol. i. p. 10.

<sup>4</sup> Selw. N. P. 915.



which may happen to the goods in lighters or boats going aboard, *previous* to the voyage. Yet, as the policy says, the risk shall continue "till the goods are safely landed," it seems no less obvious, where ships cannot come close to the quay, in order to unload, the insurer continues responsible for the risk to be run in carrying the goods in boats to the shore. If there be a loss, however, in these cases, the accident must have happened while the goods were in the boats or lighters belonging to the ship; for then it is considered a continuance of the same ship and voyage. But if the owner of the goods chooses to employ his own private lighter to land them<sup>1</sup>; or if, after the goods are put on board a public lighter, the owner takes them into his own possession, and discharges the lighterman<sup>2</sup>, the underwriter in such cases will not be liable. But where the goods were landed in a public lighter, publicly registered, the underwriters were held liable for the damage which happened, although the lighters had been employed and paid by the consignees of the goods<sup>3</sup>.

*Fifthly, The various Perils against which the Insurer undertakes to indemnify the Assured.*

The words now used in policies are so comprehensive, that there is scarcely any event unprovided for. The insurer undertakes to bear "all perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, and quality soever; barratry of the master and mariners; and all other perils, losses, and misfor-

<sup>1</sup> *Sparrow v. Carruthers*, 2 Str. 1236.

<sup>2</sup> *Strong v. Nataly*, 1 N. R. 16.

<sup>3</sup> *Hurty v. The Royal Exch. Ass. Comp.* 2 Bos. and Pul. 430. See *Rucker v. The London Assurance Comp.* *Ibid.* 432, n. (a). *Matthie v. Potts*, 2 *Ibid.* 23.

tunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, or any other part thereof." But although the words descriptive of the hazards run by the insurers, are so very comprehensive, it should seem, says Mr. Park, that a great difference is to be made between the damage sustained by goods from injuries on board a ship, and that which occurs by external accidents. That the insurer is liable in the latter case cannot admit of a doubt; but as the former may proceed from bad stowage of the goods, or from their being exposed to wet, the ship, and not the insurer, ought to be answerable. In *Malyne*<sup>1</sup> it is said, that if any loss arises from theft on board the ship by the mariners, the insurers are not chargeable with the loss, but the master must make it good; which opinion is supported by the statute 26 Geo. III. c. 86. by which the owners of the ship are liable to make good all losses happening on shipboard, to the amount of the value of the ship and freight.

But that the underwriter is liable for a robbery of the goods insured, when committed by thieves from without, cannot be doubted; as thieves are a peril expressly insured against by the policy<sup>2</sup>.

The policy is frequently made with the words "lost or not lost" in it, by which the insurer takes upon himself, not only the risk of future loss, but also the loss, if any, that may already have happened<sup>3</sup>.

*Sixthly, The Premium, or Consideration for the Risk or Hazard run.*

This is the most material part of the policy, because it is the consideration of the premium received, that makes the underwriter liable for the losses that may happen. For,

<sup>1</sup> P. 295.

<sup>2</sup> *Harford v. Maynard*, Guildhall, Hil. Vac. 1785.

<sup>3</sup> *Marshall's Insurance*, 237.

if the premium were not actually paid at the time of the subscription, it does not appear that the underwriter can afterwards maintain an action for it against the assured, the policy expressing it to have been received at the time of underwriting.

*Seventhly, The Date.*

Regularly the policy should be dated ; that is, the day, month, and year in which it is made should be added. It is usual, though not essentially necessary, to specify the sum insured.

*Eighthly, The Stamp.*

The policy must be duly stamped, according to the regulations of the 48 Geo. III. c. 140, Sched. Part I. which are as follow :

1. Where the policy of assurance of any ship, or upon any goods or property on board, or upon the freight of any ship, or upon any other interest relating to any ship, or upon any voyage to or from any port or place in the United Kingdom of Great Britain and Ireland, or in the islands of Guernsey, Jersey, Alderney, or Sark, or the isle of Man, to any other port in the said United Kingdom of Great Britain, &c. where the premium or consideration shall not exceed 20s. per cent. on the sum insured ; if the whole sum insured shall not exceed 100*l.* a duty must be paid of 1*s.* 3*d.*

If it exceeds 100*l.* then for every 100*l.* and also for any fractional part of 100*l.* whereof the same shall consist, 1*s.* 3*d.*

And where the premium or consideration shall exceed 20s. per cent. on the sum insured, if the whole sum shall not exceed 100*l.*—2*s.* 6*d.*

If it exceeds 100*l.* then for every 100*l.* and also for any fractional part of 100*l.* whereof the same shall consist, 2*s.* 6*d.*

But

But if the separate interests of two or more distinct persons shall be insured by one policy, then the said duty of 1*s.* 3*d.* or 2*s.* 6*d.* shall be charged in respect of each fractional part of 100*l.* as well as in respect of every full sum of 100*l.* insured, upon any separate and distinct interest.

2. Policies of assurance upon any other voyage than before specified, or for any certain term, not exceeding twelve calendar months:

Where the premium shall not exceed 20*s.* per cent. on the sum insured, if the whole sum insured shall not exceed 100*l.*—2*s.* 6*d.*

If it exceeds 100*l.* then for every 100*l.* and also for any fractional part of 100*l.* whereof the same shall consist, 2*s.* 6*d.*

And where the premium shall exceed the rate of 20*s.* per cent. on the sum insured, if the whole sum insured shall not exceed 100*l.*—5*s.*

If it exceeds 100*l.* then for every 100*l.* and also for any fractional part of 100*l.* whereof the same shall consist, 5*s.*

But if the separate interests of two or more distinct persons shall be insured by one policy, then the duty of 2*s.* 6*d.* and 5*s.* shall be charged in respect of each and every fractional part of 100*l.* as well as in respect of every full sum of 100*l.* insured upon any separate interest.

3. Policies of assurance, commonly called a mutual insurance, whereby persons insure one another without any premium or pecuniary consideration:

Upon any voyage from any port in the United Kingdom of Great Britain, or in the islands of Guernsey, Jersey, Alderney, or Sark, or the isle of Man, to any other port in the said kingdom, or islands, or isle of Man, for every 100*l.* and

and also for each fractional part of 100*l.* thereby insured to any person, 2*s.* 6*d.*

Upon any other voyage whatsoever, or for any certain term, or period of time, not exceeding twelve calendar months; for every sum of 100*l.* and also for each fractional part of 100*l.* insured to any person, 5*s.*

The cases when alterations may be made in a policy of insurance duly stamped, without an additional stamp being necessary, are regulated by the statute 35th Geo. III: c. 63. s. 13. which enacts, that provided the alteration be made before notice of the determination of the risk originally insured, and that the premium or consideration originally paid or contracted for, exceed the rate of ten shillings on the sum insured, and that the thing insured remain the property of the same person or persons, and that the alteration do not prolong the term insured beyond the period (twelve months) allowed by this act, and that no additional or further sum be insured by means of such alteration; that no additional stamp duty is necessary by reason of such alteration.

Upon this statute it has been held, that where a policy of insurance had been effected "on goods and specie on board of ship or ships sailing between the first of October 1799 and the first of June 1800," an alteration in the policy, extending the time of sailing to the first of August 1800, did not require a new stamp; for by the words of the act, "so that the alteration be made before the determination of the risk originally insured," is to be understood such a determination of it, as is occasioned either by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage<sup>1</sup>. But where the original policy was effected "on ship and outfit," and after the ship had sailed, and the risk had attached, was altered to "on ship and goods," it was held that the policy in its altered

<sup>1</sup> *Kensington v. Inglis*, in error, 8 East's Rep. 273.



state required an additional stamp; for the words, "the thing insured shall remain the property of the same persons," apply to one identical and continued subject matter during the whole time insured <sup>1</sup>.

*2. Of the Construction of the Policy.*

A policy of insurance being considered as a simple contract of indemnity, must always be construed, as nearly as possible, according to the intention of the contracting parties, and not according to the strict and literal meaning of the words. And, in questions on such construction, no rule has been more frequently followed than the usage of trade <sup>2</sup>.

In the case of *Robertson v. French* <sup>3</sup>, Lord Ellenborough said, "that the same rule of construction which applies to all other instruments, applies equally to the instrument of a policy of insurance, namely, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

A policy on a ship generally from A. to B. shall not be construed to be discharged until the ship is unladed. But if it contain the usual words, "till moored twenty-four hours in safety," the insurers shall be answerable for no loss that does not happen before the expiration of that time;

<sup>1</sup> *Hill v. Patten*, 8 East's Rep. 373.

<sup>2</sup> 1 Bar. 348.

<sup>3</sup> 4 East's Rep. 130.

even though the loss was occasioned by an act of barratry of the master during the voyage <sup>1</sup>.

So if a ship be insured for six months, and three days before the expiration of the time receive her death's wound, but by pumping is kept afloat for three days after the time, the insurer is discharged <sup>2</sup>.

Under a policy containing the usual words, "till moored twenty-four hours in safety," and where the captain, the very day on which the ship arrived at her moorings, was served with an order from Government to return in order to perform quarantine, the underwriters were held liable for a subsequent loss; for under such circumstances the ship could not be said to have been moored twenty-four hours in safety, although she did not go back for some days <sup>3</sup>.

In an insurance upon freight, if an accident happens before any goods are put on board, which prevents her sailing, the freight cannot be recovered <sup>4</sup>.

But if the policy be a valued policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover to the whole amount of the policy <sup>5</sup>.

So in an open policy on freight, the underwriters were held liable to pay the insurance, though the ship had sailed in ballast, and was captured before her arrival at the place where the cargo was to be put on board; for on the instant of the departure of the ship, the contract for freight has its inception, and the right to freight commences <sup>6</sup>.

When an insurance is "at and from" any place, the ship on her arrival at that place, is protected during her

<sup>1</sup> *Lockyer v. Osley*, 1 T. R. 252.

<sup>2</sup> *Merctony v. Dunlop*, Easter T. 23 Geo. III. B. R.

<sup>3</sup> *Waples v. Eames*, 2 Str. 1243.

<sup>4</sup> *Tonge v. Watts*, 2 Str. 1251.

<sup>5</sup> *Montgomery v. Eggington*, 3 T. R. 362.

<sup>6</sup> *Thompson v. Taylor*, 6 T. R. 478.

preparation for the voyage upon which it is insured: but if all thoughts of the voyage be laid aside, and the ship be there for a considerable time with the owner's privity, the insurer is discharged <sup>1</sup>.

But a policy at and from a place, the name of which equally designates a particular town, and a port comprehending an extensive district of coast, does not protect a cargo laden any where within the limits of the port, but refers to the town itself <sup>2</sup>.

Neither will a policy, if it describes a voyage at and from a place which is the head of a port, cover a voyage at and from a distinct place which is a member of the same port <sup>3</sup>.

And if a policy be effected on goods on a voyage defined from A. to B., the risk to commence at and from the loading thereof on board, not specifying where, it must be intended a loading at the place from which the voyage commenced. And if it be proved, that the goods were loaded in an earlier part of the ship's course, and before her arrival at the place where the voyage insured was to commence, the assured, in case of loss, cannot recover on the policy <sup>4</sup>.

Where a ship was chartered on a voyage from London to Dominica, and back to London, at a certain freight upon the outward cargo, and after delivering her outward cargo at Dominica, the charterers were to provide her a full cargo homeward, at the current freight from Dominica to London, it was held that an insurance, by the owner of the ship, on the freight at and from Dominica to London, attached while the ship lay at Dominica, delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured <sup>5</sup>.

<sup>1</sup> *Chitty v. Selwyn*, 2 Atk. 359.

<sup>2</sup> *Constable v. Noble*, 2 Taunt. 403.

<sup>3</sup> *Payne v. Hutchinson*, *Ibid.* n.

<sup>4</sup> *Spitta v. Woodman*, *Ibid.* 416.

<sup>5</sup> *Horncastle v. Stuart*, 7 East's Rep. 409.

So on a policy on freight, "at and from London to Jamaica, with liberty to touch at Madeira, and to discharge and take in goods there;" such freight to be paid in Madeira, on delivery of the goods shipped at London for that place, by Madeira wine at 40*l.* per pipe, to be carried in the said ship free of freight; the underwriters were held liable for the total freight, though when the ship was captured the wine to be paid for freight was not on board; for the contract of freight was entire, and the charterparty treats the whole as one voyage<sup>1</sup>.

Where there was an assurance on the outward and homeward bound voyage, and the latter ran "at and from Jamaica to London," it was held, that the homeward risk began when the ship moored at any port of the island, and that there the outward risk ended, and did not continue till she came to the last port of delivery<sup>2</sup>.

In the cases of *Barrass v. The London Ass. Comp.*<sup>3</sup>, and *Leigh v. Mather*<sup>4</sup>, it was held that the risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island for which it was destined; but that the outward risk *upon goods* continued till they were landed.

In the construction of policies, the strictum jus; or apex juris; is not to be the rule: but a liberal construction is to be adopted, and the usage of the trade called in to explain any doubts. Thus, in an insurance on goods from Malaga to Gibraltar, and from thence to England or Holland, the parties having agreed that the goods might be unloaded at Gibraltar, and reshipped in one or more British ship or ships, and it appearing in evidence that there was no British ship at Gibraltar, but that the goods had been unloaded and put into a store ship (which was always considered as

<sup>1</sup> *Atty v. Lindo*, 1 New Rep. 236.

<sup>2</sup> *Camden v. Cowley*, 1 Bl. Rep. 417.

<sup>3</sup> *Guildhall Sitt.* after Hil. 1782.

<sup>4</sup> *Guildhall Sitt.* after Mich. T. 1795.

a warehouse),

a warehouse), the insurers were held to be liable for the loss of these goods in the store ship <sup>1</sup>.

In the case of *Pelly v. Royal Exchange Assurance Company* <sup>2</sup>, Lord Mansfield said, “the insurer at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it; and what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy.” The same principles were adhered to in *Noble v. Kennoway* <sup>3</sup>, where the same learned judge said, “that every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established or not.”

In no instance is a reference to the usage of trade more apparent than in the cases of insurance upon East India voyages. The charterparties of the East India Company give leave to prolong the ship's stay in India for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general, without limitation of time or place. These charterparties are so notorious, and the course of the trade so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship might be sent while in India, though not expressly mentioned in the policy. These principles were fully laid down and settled in the nine causes tried upon the ship *Winchelsea*, East Indiaman; the verdicts in which were ultimately uniform for the plaintiffs the insured, against the underwriters <sup>4</sup>.

From these cases it is evident, that in the construction of East India policies, whether the words be large and comprehensive, or restrained and limited, the usage of trade will always be considered, and the intermediate and coun-

<sup>1</sup> *Turney v. Etherington*, 1 Bur. 348.

<sup>2</sup> 1 Bur. 341.

<sup>3</sup> Doug. 492.

<sup>4</sup> *Salvador v. Hopkins*, 2 Bur. 1707.



try voyages held to be insured. However, the parties may, by their own agreement, prevent such latitude of construction. Nor need this be done by express words of exclusion; but if, from the terms used, it can be collected that such was the intention of the parties, that construction will prevail <sup>1</sup>.

But though this contract meets the most liberal construction, yet the equitable principles of construction have never been carried so far as to entitle a man who has insured one species of property, to recover damage occasioned by the loss of a species of property different from that named in the policy. Thus, one who has insured a cargo of goods, cannot under that insurance recover the freight paid for the carriage; nor can an owner, who insures the *ship merely*, demand satisfaction for the loss of merchandise laden therein <sup>2</sup>, or extraordinary wages paid to seamen, or the value of provisions during a detention of the ship at any port to repair <sup>3</sup>, or a detention by embargo <sup>4</sup>.

Nor is the underwriter on goods liable for the freight paid by the owner of the goods to the proprietors of the ship, where the goods were partially lost <sup>5</sup>.

In the construction of policies of insurance upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid <sup>6</sup>.

If a ship, from stress of weather, is in a decayed condition, and goes to the nearest place to refit, it is to be considered in the same light as if she had been repaired in the very place from which the voyage was to commence, and no deviation from the terms of the policy <sup>7</sup>.

<sup>1</sup> Park's Insurance, 68.

<sup>2</sup> Molloy, b. 2. c. 7. s. 8.

<sup>3</sup> Fletcher et al. v. Poole, Guildhall Sit. after Easter, 1769. Eden v. Poole, Sit. after Hil. 1765.

<sup>4</sup> Robertson v. Lwer, 1 T. R. 127.

<sup>5</sup> Baillie v. Moudigliani, Hil. 25 Geo. III. B. R.

<sup>6</sup> Doug. 527.

<sup>7</sup> Motteux et al. v. London Assurance Company, 1 Atk. 545.

Liberty given in a policy on a fishing voyage, to chase, capture, and man prizes, does not authorise the ship to lie by nine days off a port, waiting for an enemy's ship to come out, when she should have completed her cargo; although she lay in wait during that time within the limits of her fishing ground<sup>1</sup>.

### 3. *What Persons may be insured.*

In this country all persons, whether British subjects or aliens, may, in general, be insured. But an action cannot be maintained on a policy at the suit or on the behalf of an alien enemy during war, although the property insured be of British manufacture, and exported from this country<sup>2</sup>. An insurance, however, may be effected on a ship belonging to an alien by a British subject, as trustee on behalf of the ship-owner, and an action on the policy may be maintained at the suit of the trustee even in time of war<sup>3</sup>. So an alien domiciled here in time of war, and who is licensed to carry on commerce with the belligerent country for the benefit of himself or of his correspondents, may sue and recover upon a policy in his own name in case of a loss by capture, although his correspondents may be residing at the time in the enemy's country<sup>4</sup>.

A neutral, although domiciled and carrying on trade in an enemy's country, in partnership with an alien enemy, may insure his interest in the joint property, and, on coming into this country, may sue for the recovery of the loss arising from one of the perils insured against<sup>5</sup>.

### 4. *Who may be Insurers.*

By the common law and usage of merchants, any person whatever might be an insurer. But much inconvenience

<sup>1</sup> *Hibbert v. Halliday*, 2 Taunt. 428.

<sup>2</sup> *Brandon v. Nesbitt*, 6 T. R. 23. *Bristow v. Towers*, 5 *Ibid.* 25.

<sup>3</sup> *Kensington v. Inglis*, 8 East's Rep. 283.

<sup>4</sup> *Usparicha v. Noble*, 13 *Ibid.* 332.

<sup>5</sup> *Rotch v. Edie*, 6 T. R. 413.

and mischief having arisen from insurances made by persons in insolvent circumstances, by the statute 6 Geo. I. c. 18, all societies and partnerships, except the Royal Exchange and London Assurance Companies, are prohibited from granting, signing, or underwriting any policy of assurance, or making any contracts for assurance, of or upon any ship or ships, goods or merchandises at sea or going to sea, and from lending any moneys by way of bottomry, on pain of the policy being ipso facto void, and the money subscribed or underwritten forfeited: and in case of any money advanced by way of bottomry contrary to this act, the bond or other security for the same to be void, and the offenders liable to be sued for an usurious contract. It is however provided, that any individual may subscribe any policy or assurance, or may lend money by way of bottomry, notwithstanding this act, so that it be not on the account or risk of a corporation or body politic, or upon account or risk of persons acting in a society or partnership for that purpose.

And therefore a contract for a marine insurance, in which the plaintiff did not alone stand the risk insured, but associated one or more in partnership with him, cannot be enforced<sup>1</sup>. And although one partner in such illegal insurances has paid the whole of the loss, he will not be allowed to recover any part of the premiums from his co-partners<sup>2</sup>. Which decisions have been fully confirmed in the case of *Aubert v. Mâze*, 2 Bos. and Pul. 571.

But though this statute deprives the assurers of their remedies against each other, it does not operate so as to deprive the assured of their action against the underwriter, if there be another secretly concerned with him in the risk<sup>3</sup>.

<sup>1</sup> *Sullivan v. Greaves*, Sittings after E. T. 1789.

<sup>2</sup> *Booth v. Hodgson*, 6 T. R. 405. *Mitchel v. Cockburne*, 2 Hen. Bl. 379.

<sup>3</sup> 6 T. R. 405.

The rule then established by these cases seems to be, that if the credit of any company or society (except the two mentioned in the statute) be in any event pledged in a contract of this nature, the contract is void. Thus, where a company of ship owners engaged to insure each others ships, though they covenanted severally, and not jointly, to pay a certain sum in case of loss, in proportion to their respective shares; yet, as there was a clause providing that in case of the insolvency of any one of the members, all the others were to be responsible, the contract was void<sup>1</sup>.

But if in such an association, each individual subscriber is liable only for the sum to which his name appears, and not for the default of the other subscribers, such an association is not an infringement of the act<sup>2</sup>.

By sections 24, 25, and 26 of the statute, all the rights and privileges which the South Sea and East India Companies enjoyed previous to the passing of the act, and the right of lending money on bottomry to the captains of their own ships, are secured.

### 5. *What Things may be insured.*

The subjects of marine insurance are ships, goods, merchandise<sup>3</sup>, freight<sup>4</sup>, bottomry, and respondentia interest<sup>5</sup>; a special interest in goods, as the lien of a factor<sup>6</sup>; money expended by the captain for the use of an East India ship<sup>7</sup>; the captain's commission and privileges in an African trade ship<sup>8</sup>; the profits expected to arise from a cargo<sup>9</sup>. With respect, however, to an insurance on freight, it is to be ob-

<sup>1</sup> *Lees v. Smith*, 7 T. R. 338.

<sup>2</sup> *Harrison v. Millar*, 2 Esp. N. P. C. 513.

<sup>3</sup> 1 Magens's Essay on Insurance, 4.

<sup>4</sup> *Montgomery v. Eggrinton*, 3 T. R. 362.

<sup>5</sup> *Glover v. Black*, 3 Bur. 1394. 1 Bl. Rep. 405.

<sup>6</sup> *Godin v. The London Assurance Company*, 1 Bur. 489.

<sup>7</sup> *Gregory v. Christie*, Park. 11.

<sup>8</sup> *King v. Glover*, 2 New Rep. 206.

<sup>9</sup> *Grant v. Parkinson*, Park, 267. *Carclay v. Cousins*, 2 East's Rep. 514.

served, 1st, that the freight ought to be insured *eo nomine* as freight, and that it will not be covered by an insurance on goods<sup>1</sup>; and, 2dly, unless an inchoate right to the freight has commenced, the assured will not be entitled to recover<sup>2</sup>.

By the maritime regulations of most if not all the trading powers in Europe, insurances upon the wages of seamen are forbidden. In Great Britain, for the purpose of making the sailors interested in the return of the ship, it is enacted by the 8th Geo. I. c. 24. s. 27, that no master or owner of any merchant ship shall pay to any seaman beyond the seas any money or effects on account of wages, exceeding one moiety of the wages due at the time of such payment, till such ship shall return to Great Britain or Ireland. But the good effects of this law would be entirely defeated, if they were permitted to insure their wages. A sailor, therefore, can neither insure his wages, nor any commodity which he is to receive at the end of the voyage in lieu of wages<sup>3</sup>. It should, however, seem, that this regulation does not extend to prevent mariners from insuring for the homeward voyage those wages which they have received abroad, or goods which they have purchased with those wages<sup>4</sup>.

All insurances upon the property of an open enemy are void, and subject the party offending to imprisonment for three months<sup>5</sup>.

#### 6. *Of Losses.*

##### *By Perils of the Sea.*

Every accident happening by the violence of the winds or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, or by any other violence which human prudence could not foresee, nor human strength resist, may be considered as a peril of the sea; and

<sup>1</sup> *Baillie v. Moudigliani*, Park, 53.

<sup>2</sup> *Webster v. De Tasset*, 7 T. R. 157.

<sup>3</sup> *Magens*, 49.

<sup>4</sup> *Tonge v. Watts*, 2 Str. 1251.

<sup>5</sup> 33 Geo. III. c. 27. s. 4.



the insurer must answer for all damages sustained in consequence of such accident<sup>1</sup>. But if a ship be driven by stress of weather on an enemy's coast, and is there captured, it is a loss by capture, and not by perils of the sea<sup>2</sup>.

The mistake of the captain, as where he missed the island for which he was bound, is not a peril of the sea<sup>3</sup>.

Neither is the destruction of a ship by a species of worms infesting the rivers of Africa, a peril of the sea<sup>4</sup>.

A ship which is not heard of within a reasonable time after her departure shall be presumed to have perished at sea<sup>5</sup>. What shall be deemed a reasonable time, must depend on the distance and the length of the voyage, &c. A practice prevails among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any part of Europe, or within twelve months, if for a greater distance<sup>6</sup>.

### *By Capture,*

As between the insurer and insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer is answerable to the extent of the sum insured for the loss actually sustained<sup>7</sup>.

No capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time, he will be entitled; and by the statutes 29 Geo. II. c. 34. s. 21. 33 Geo. III. c. 66. s. 42, if an English ship retake the vessel captured, either before or after

<sup>1</sup> 1 Show. 323. Marshall's Insurance, 416.

<sup>2</sup> Green v. Elmslie, Penke's N. P. C. 212.

<sup>3</sup> Gregson v. Gilbert, Easter, 23 Geo. III. B. R.

<sup>4</sup> Rohl v. Parr, Guildhall Sittings after Hil. 1796.

<sup>5</sup> Green v. Brown, 2 Str. 1199. Newby v. Read, Sittings after Mich. 3 Geo. III.

<sup>6</sup> Park's Insurance, 86.

<sup>7</sup> 2 Bur. 691. Depaiba v. Ludlow, Com. Rep. 360.

condemnation, the owner is entitled to restitution upon stated salvage. In which cases it is to be observed, that if the ship be recovered before a demand, the underwriter is responsible for the amount only of the loss sustained at the time of the demand; and that if he has paid the loss before the recovery, he will be entitled to stand in the place of the assured <sup>1</sup>.

Although, by the terms of the policy, the underwriters undertake to indemnify the assured against all captures and detentions of princes, yet it has been held, that any assurance made on enemy's property against British capture is illegal and void, and consequently that the assured could not recover, even after the cessation of hostilities, on a policy of insurance effected in this country before the commencement of hostilities <sup>2</sup>.

### *By Detention of Princes, &c.*

On questions of detention not much difficulty has arisen: the underwriter, by express words, undertakes to indemnify against all damages arising from the arrests, restraints, and detentions of kings, princes, or people.

Under these terms in a policy, detention is said to be an arrest or embargo in time of war or peace, laid on by the public authority of the state <sup>3</sup>. And therefore, in case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the underwriter <sup>4</sup>.

In case of detention by a foreign power, who in time of war may have seized a neutral ship, in order to be searched for enemy's property, the costs and charges consequent thereon must be borne by the underwriter <sup>5</sup>.

<sup>1</sup> Park's Insurance, 88.

<sup>2</sup> Furlado v. Rodgers, 3 Bos. and Pol. 191. Gamba v. Le Mesurier,

<sup>4</sup> East's Rep. 507. Kellner v. Le Mesurier, 4 Ibid. 396.

<sup>3</sup> Malync, 110.

<sup>5</sup> Salucci v. Johnson, Hil. 25 Geo. III. B. R.

<sup>4</sup> 2 Burr. 696.

But a detention for non-payment of customs, or for navigating against the laws of those countries where the ship happens to be, shall not fall upon the underwriter <sup>1</sup>.

Where the risk is "at and from," insurers are liable for the payment of damage arising by the detention or seizure of ships before the commencement of the voyage, by the government of the country where the ship loads <sup>2</sup>.

But if a party of rioters board a ship, and take part of the cargo, the underwriters are not liable, on a count stating a loss to be by *people* to the plaintiffs unknown; for the word *people* in the policy means the ruling and supreme power of the country <sup>3</sup>.

British underwriters are not liable for damages which owners of foreign vessels may sustain from embargo laid by the British government on foreign ships <sup>4</sup>.

But where the assured is a subject of this country, he may recover against a British underwriter for the loss sustained by the detention of the British government <sup>5</sup>.

In all cases of losses by detention, before the insured can recover, he must abandon to the underwriter whatever claims he may have to the property insured <sup>6</sup>.

### *By Barratry.*

The derivation of the word barratry is very doubtful; it comes most probably from the Italian *barratrare*, to cheat. It may be thus defined: Any act of the master and mariners of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, and without their consent and privity <sup>7</sup>. But to constitute barratry, there must be a breach of duty by

<sup>1</sup> 2 Vern. 156.

<sup>2</sup> Green v. Young, 2 Lord Raym. 840. Rotch v. Edie, 6 T. R. 413.

<sup>3</sup> Nesbitt and another v. Lushington, 4 T. R. 783.

<sup>4</sup> Touteng v. Hubbard, 3 Bos. and Pul. 291.

<sup>5</sup> Page v. Thompson, Guildhall Sitt. after Hil. 1801.

<sup>6</sup> Park's Insurance, 169.

<sup>7</sup> Ibid. 111.

the master, in respect of his owners, with a fraudulent or criminal intent, or *ex maleficio* <sup>1</sup>.

It is not necessary, in order to make the insurers liable, that the loss should happen in the very act of barratry ; that is, it is immaterial whether it take place *during* the *fraudulent* voyage, or *after* the ship has returned to the regular course ; for the moment the ship is carried from its right track with a fraudulent intention, barratry is committed <sup>2</sup>.

But the loss in consequence of the act of barratry must happen *during the voyage insured*, and within the time limited for the expiration of the policy, otherwise the underwriters are discharged <sup>3</sup>.

Barratry may be committed either by a wilful deviation <sup>4</sup>, in fraud of the owner, by smuggling<sup>5</sup>, by running away with the ship, by sinking or deserting her, or by defeating or delaying the voyage with a criminal intent <sup>6</sup>.

So barratry may be committed, if the master cruizes and captures a prize, in consequence of which the vessel was lost, although he thought he was acting for the benefit of the owners <sup>7</sup>.

So if the master trade with an enemy, even with a view to the advantage of his owners, it is barratry, if on account of such illegal traffic the vessel insured is condemned <sup>8</sup>.

So if he sail out of port, without paying the port duties, whereby the ship is forfeited, it is barratry <sup>9</sup>.

But where a ship sailed a different course from that first intended, which alteration was publicly notified before the ship sailed, and where the master was to have no benefit by the change, it was held not to be barratry <sup>10</sup>.

<sup>1</sup> *Earle v. Rowcroft*, 8 East's R. 126.

<sup>2</sup> *Lockyer v. Offley*, 1 T. R. 252.

<sup>3</sup> *Ibid.* <sup>4</sup> *Cowp.* 143. <sup>5</sup> 1 T. R. 252.

<sup>6</sup> *Selw. N. P.* 969. <sup>7</sup> *Moss v. Pyrom*, 6 T. R. 370.

<sup>8</sup> *Earle v. Rowcroft*, 8 East's Rep. 126.

<sup>9</sup> *Knight v. Cambridge*, 1 Str. 581.

<sup>10</sup> *Stamma v. Brown*, 1. Str. 1173.

So if a ship take a prize, and instead of proceeding on her voyage the captain is forced by the mariners to return to port with his prize, against the orders of his owners, the captain is justified of necessity ; and it is not barratry, because not done to defraud his owners <sup>1</sup>.

Neither is an act of the captain, with the knowledge of the owners of the ship, though without the privity of the owner of the goods, who happened to be the person insured, barratry : for barratry cannot be committed by any person except the master or mariners, nor against any person except the owners of the ship <sup>2</sup>.

And if the master of the ship be also owner, any act, which in another master would be construed barratry, cannot be so in him <sup>3</sup> ; even though he has mortgaged his ship <sup>4</sup>.

It will be proper also to remark, that barratry cannot be committed against the owner of the ship with his consent <sup>5</sup>.

### *By Fire.*

Fire is expressly mentioned in the policy as a loss within the perils against which the underwriters agree to indemnify the insured. And therefore where a ship was set on fire to prevent her falling into the hands of an enemy of superior force, it was held that the underwriters were liable to make good the loss <sup>6</sup>. Fire, said Lord Ellenborough, is expressly mentioned in the policy, as one of the perils against which the underwriters undertake to indemnify the assured ; and if the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident or by lightning, or by an act done to the state <sup>7</sup>.

<sup>1</sup> *Elton v. Brogden*, 2 Str. 1261.

<sup>2</sup> *Nutt v. Bourdieu*, 1 T. R. 323. *Vallejo v. Wheeler*, Cowp. 143.

<sup>3</sup> *Ross v. Hunter*, 4 T. R. 53.

<sup>4</sup> *Park's Insurance*, 128.

<sup>5</sup> *Selw. N. P.* 972.

<sup>6</sup> *Gordon v. Remington*, 1 Camp. N. P. C. 123.

<sup>7</sup> *Ibid.*



So, if a ship be driven a mile on shore by a hurricane, or be burnt in a dry dock while repairing, the insurer is liable <sup>1</sup>.

### 7. *Partial Losses.*

A partial loss upon a ship or goods is such a proportion of the prime cost, as is equal to the diminution in value occasioned by the loss <sup>2</sup>. By express stipulation in the terms of the London policies, the underwriters declare that they will not be answerable for partial losses not amounting to 3*l.* per cent. However, though they provide against trifling claims for partial losses, they undertake to indemnify against losses, however inconsiderable, that arise from a general average <sup>3</sup>.

If several articles be insured for one sum, with a distinct valuation on each, as upon ship so much, on cargo so much, and no part of the cargo be taken on board, so that the risk on that never attaches; if the ship be lost, the insured shall recover such a portion of the sum insured as the value of the article lost bore to the value of the whole <sup>4</sup>.

When goods are partially damaged, the underwriter must pay the owner such proportion of the prime cost or value in the policy, as corresponds with the proportion or diminution in value occasioned by the damage: if no value is stated in the policy, then the invoice price, together with all charges until the goods are put on board, and the premium of insurance, will be the ground of computation.

And whether the goods arrive at a good or bad market, it is immaterial to the insurer; for the true way of estimating the loss is, to take the value of the commodity at the prime cost or fair invoice price <sup>5</sup>.

<sup>1</sup> Per Lord Mansfield, 1 Bur. 341.

<sup>2</sup> Marshall's Insurance, 535.

<sup>4</sup> Amery v. Rodgers, 1 Esp. R. 207.

<sup>5</sup> Dick and another v. Allen, Guildhall Sitt. after Mich. T. 1785.

<sup>3</sup> Park's Insurance, 135.

But these rules can only apply to cases where there is a specific description of goods: where the property is of various kinds, an account must be taken of the value of the whole, and a proportion of that as the amount of the goods lost <sup>1</sup>.

In adjusting a partial loss on goods arising from sea damage, the calculation is to be made on the difference between the respective gross proceeds of the same goods when sound and when damaged, and not on the net proceeds <sup>2</sup>; for the loss for which the underwriter is alone responsible, is the deterioration of the commodity by sea damage, and not for any loss which may be the consequence of the fluctuation of the market, or of the duties or charges to be paid after the arrival of the commodity at the place of its destination <sup>3</sup>.

Since the 19th of Geo. II. in case of a total loss, the constant usage has been to let the valuation in the policy remain, unless there be proof that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods <sup>4</sup>.

Some goods are of a perishable nature; against the losses arising from the natural and inherent principle of corruption in them, the underwriters, by the ordinances of most countries, are held to be discharged. The underwriters of London have, indeed, by express words inserted in their policy declared, that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship being stranded; against a loss by which latter event, the two insurance companies do not undertake to be answerable <sup>5</sup>.

<sup>1</sup> *Le Gras v. Hughes*, Easter, 22 Geo. III. B. R.

<sup>2</sup> *Johnson v. Shedden*, 2 East's Rep. 531. recognised in 3 Bos. and Pul. 303.

<sup>3</sup> *Lewis v. Rucker*, 2 Bur. 1167.

<sup>4</sup> *Park's Insurance*, 143.

<sup>5</sup> 3 Bur. 1553.

On this clause it has been held that no loss of such commodities shall be deemed a total one, so as to charge the insurers, as long as the commodity specifically remains, though perhaps wholly unfit for use. The case in 2 Stra. 1065. to the contrary has been since overruled by that of *Mason v. Skurray*<sup>1</sup>; in which it was also held, that the term malt, includes peas, beans, and malt; though rice has lately been held not to be so considered<sup>2</sup>. Neither is saltpetre included within the term malt<sup>3</sup>.

The doctrine that the underwriter is discharged while the commodity specifically remains, though it may be so damaged as to render it on that account the subject of total loss, was held with respect to a cargo of wheat, which was partially damaged in a storm<sup>4</sup>.

The same was held with respect to a cargo of fish, which was stinking and of no value when examined<sup>5</sup>.

But where a cargo of fruit was so much putrefied from sea damage that it was obliged to be thrown overboard, the underwriters were held liable<sup>6</sup>.

### *S. Of Adjustment.*

The adjustment of a policy is the settling and ascertaining of the amount of the indemnity which the assured, after all allowances and deductions are made, is entitled to receive under the policy, and the fixing of the proportion which each underwriter is liable to pay<sup>7</sup>. And after the signing of which, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances

<sup>1</sup> *Guildhall Sitt.* after Hil. 1780.

<sup>2</sup> *Moody v. Surridge*, *Sitt.* after Hil. 1793. *Scott v. Bourdillion*, 2 New Rep. 213.

<sup>3</sup> *Journe v. Boardien*, *Sitt.* after Easter, 27 Geo. 111.

<sup>4</sup> *Wilson v. Smith*, 3 Bur. 1550.

<sup>5</sup> *Cocking v. Fraser*, 25 Geo. 111. B. R.

<sup>6</sup> *Dyson v. Rawcroft*, 3 Bos. and Pul. 474. *McAndrews v. Vaughan*, *Guildhall Sitt.* after Mich. 1791.

<sup>7</sup> *Marshall's Insurance*, 529.

respecting it : the adjustment being considered as a note of hand <sup>1</sup>.

But though an adjustment is *primâ facie* evidence against the underwriter, yet, if there has been any misconception of the law or fact upon which it has been made, the underwriter is not absolutely concluded by it <sup>2</sup>; and until he actually pays the loss, he may avail himself of any defence, either upon the facts or the law of the case <sup>3</sup>.

So unless there was a full disclosure of the circumstances of the case as they really existed, before the underwriter signed, his liability to the assured will be discharged, notwithstanding the adjustment <sup>4</sup>.

### 9. *Of Total Losses and Abandonment.*

A total loss is of two kinds ; one, where the property insured perishes ; the other, where the property exists, but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it <sup>5</sup>. In the latter case the assured may elect to abandon to the underwriter all right to such part of the property as may be saved ; and having given due notice of his intention to do so, the assured will then be entitled to demand a compensation as for a total loss : but if the assured does not in fact abandon, or if he omits to give the underwriter notice of his having abandoned, or if, being required by the underwriter to assign over his interest in the property insured, he refuses to do so <sup>6</sup>, he will not be entitled to claim as for a total loss <sup>7</sup>.

When the assured has received intelligence of such a loss as entitles him to abandon, it is incumbent on him to

<sup>1</sup> *Hog v. Gouldney*, Guildhall Sitt. after Trin. 1745. Beawes's *Lex Merc.* 310.

<sup>2</sup> *Rogers v. Maylor*, Sitt. after Trin. 1790. *De Garron v. Galbraith*, Sitt. after Trin. 1795.

<sup>3</sup> *Herbert v. Champion*, 1 *Campb. N. P. C.* 134.

<sup>4</sup> *Shepherd v. Chewter*, 1 *Campb. N. P. C.* 274.

<sup>5</sup> 6 *T. R.* 425.

<sup>6</sup> 8 *T. R.* 266.

<sup>7</sup> 7 *Schw. N. P.* 974.

make his election to abandon, and to give notice thereof to the underwriter within a reasonable time after receipt of the intelligence<sup>1</sup>: otherwise the assured will be considered as having waved his right to abandon; and in case any part of the property insured be saved, he can recover as for a partial loss only<sup>2</sup>.

In the case of *Hodgson v. Blackiston*<sup>3</sup>, it was held, that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received.

But if the insured, hearing that his ship is much disabled and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by the refusal, though it should amount to the whole sum insured<sup>4</sup>.

When an abandonment is made, it must be a total, not a partial one; that is, one part of the property insured shall not be retained, and the other part abandoned<sup>5</sup>.

In case of a capture the assured may abandon, and claim as for a total loss; and a recapture will not deprive him of this right, if neither the thing insured nor the voyage be lost<sup>6</sup>. But where a mere capture, followed by a recapture, has taken place, and neither the thing insured nor the voyage be lost, and the damage sustained does not amount to a moiety of the value, the assured can only claim for the loss he has actually sustained. For the right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon<sup>7</sup>.

<sup>1</sup> *Barker v. Blakes*, 9 East's Rep. 282.

<sup>2</sup> *Mitchell v. Edie*, 1 T. R. 698. *Alwood v. Henckell*, Guildhall Sitt. after Mich. 1795, B. R. cited in Park, 172.

<sup>3</sup> Sitt. after Hil. 38 Geo. III. B. R.

<sup>4</sup> *Da Costa v. Newnham*, 2 T. R. 407.

<sup>5</sup> *Pothier*, s. 128.

<sup>6</sup> *Goss v. Withers*, 2 Bur. 683. *Miles v. Fletcher*, Doug. 230.

<sup>7</sup> *Hamilton v. Mendez*, 2 Bur. 1198. 1 Bl. Rep. 276.



If the ship and goods are restored in safety, between the offer to abandon and the action brought, the assured cannot proceed as for a total loss<sup>1</sup>.

If by a peril insured the voyage is lost, it is a total loss ; and therefore if the voyage be defeated by damage done to the ship, the assured may abandon<sup>2</sup>.

Where a neutral ship bound from America to Havre was detained and brought into a British port for the purpose of search, and pending proceedings in the Admiralty the king of Great Britain declared Havre in a state of blockade, by which the further prosecution of the voyage was prohibited ; this was held to be a total loss of the voyage, which would entitle the neutral assurer to abandon, and to recover as for a total loss. But not having given notice of abandonment in due time, he could only recover for a partial loss<sup>3</sup>.

But to justify an abandonment, the loss must be occasioned by one of the perils specified in the policy ; and therefore it has been held not to be a loss within the policy, for which the assured can abandon, and recover as for a total loss of the cargo, that the port of destination has been shut by order of the enemy against ships of the nation to which the insured ship belongs, although the cargo was of a perishable nature, and it was sold at another port for a very small price<sup>4</sup>.

So if a ship, finding her port of destination shut, sail back for her port of outfit, without intending to complete the voyage insured, this is a voluntary abandonment of the voyage, and will discharge the underwriters<sup>5</sup>.

Before a person insured can demand from the under-

<sup>1</sup> *Bainbridge v. Neilson*, 10 East's Rep. 329.

<sup>2</sup> *Manning v. Newnham*, Trin. T. 22 Geo. III.

<sup>3</sup> *Barker v. Blakes*, 9 East's Rep. 283.

<sup>4</sup> *Hadkinson v. Robinson*, 3 Bos. and Pul. 388. *Lubbock v. Rowcroft*,

<sup>5</sup> *Esp. N. P. C.* 50.

<sup>6</sup> *Blanckenhagen v. London Assurance Comp.* Sitt. before Mich. 1808.

writer a recompense for a total loss, he must abandon to him whatever claims he may have to the property insured ; and when the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantages resulting from that situation, in case the ship or property, &c. is recovered from shipwreck, capture, or any other peril stated in the policy<sup>1</sup>.

But though the assured stands as a trustee for the insurer, and, in case of abandoament, if he has received the freight, is liable to pay it over to the underwriter on freight, yet it has been held that the assured may deduct out of it the following expenses : 1. The expenses of the ship and crew in the foreign port, including port charges, besides the expense of shipping the cargo, which exclusively belongs to the underwriters upon freight. 2. Insurance thereon. 3. Wages and provisions of the crew, from their liberation in the foreign port till their discharge here. 4. Wages to the crew during their detention. But it was decided, that the assured was not entitled to deduct out of such freight,—

1. Charges paid at the port of discharge on ship and cargo.
2. Insurance on ship.
3. Diminution in value of ship and tackle by wear and tear on the voyage home<sup>2</sup>.

#### 10. *Of Fraud in Policies.*

In every contract good faith and integrity are indispensably necessary to give it its due operation. No contract can be good, unless it be equal ; that is, neither side must have an advantage by any means, of which the other is not aware<sup>3</sup>. This being admitted of contracts in general, is of double force in those of insurance, which are vacated and

<sup>1</sup> Pothier, *Traité du Contrat d'Assurance*, 133. *Randall v. Cockran*, 1 Ves. 98.

<sup>2</sup> *Sharp v. Gladstone*, 7 East's Rep. 24.

<sup>3</sup> Grot. *De Jure B. ac P.* lib. ii. c. 12. s. 23. Puff. l. v. c. 9. s. 8. Bynk. Q. J. P. p. 4. l. 4. c. 26.

annulled by any the least shadow of fraud or undue concealment<sup>1</sup>. Both parties, the insurer as well as the insured, are equally bound to disclose circumstances that are within their knowledge, whether in fact true or false; and therefore if the insurer, at the time he underwrites, can be proved to have known that the ship was safe arrived, the contract will be equally void, as if the insured had concealed from him some accident which had befallen the ship<sup>2</sup>.

Cases of fraud upon this subject are liable to a threefold division: 1st. The *Allegatio falsi*; 2d. The *Suppressio veri*; 3d. Misrepresentation<sup>3</sup>. The latter, though it happen by mistake, if in a fact or circumstance material to the risk, will vitiate the policy as much as actual fraud<sup>4</sup>.

As to the first point, that a false assertion in a policy will vitiate the contract, several cases have determined that the policy shall be void where goods, &c. are insured as the property of an ally, or as neutral property, when in fact they are the goods of an enemy<sup>5</sup>. So a misrepresentation of the time of the sailing of the ship has been held to vacate the policy<sup>6</sup>. And such false assertions in a policy will vacate the contract, even though the loss arises from a cause wholly unconnected with the fact or circumstance misrepresented<sup>7</sup>.

The second species of fraud which affects insurances, is the concealment of circumstances known only to one of the parties entering into the contract. The facts upon which the risk is to be computed lie for the most part within the knowledge of the insured only. The underwriter must therefore rely upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate.

<sup>1</sup> 2 Bl. Com. 460.    <sup>2</sup> 3 Taunt. 37.    1 Bl. Rep. 594.    <sup>3</sup> Fark, 242.

<sup>4</sup> Macdowall v. Fraser, Doug. 260.

<sup>5</sup> Skin. 327. Woolmer v. Muilman, 3 Bur. 1419.    1 Bl. Rep. 427.    Fernandes v. Da Costa, Sitt. after Hil. 4 Geo. III.

<sup>6</sup> Roberts v. Fonnereau, Guildhall Sitt. after Trin. 1742.

<sup>7</sup> Per Lee C. J. in Seaman v. Fonnereau, Str. 1183.

A merchant having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard; the policy was decreed in equity to be delivered up, the concealment of the intelligence being considered a fraud<sup>1</sup>.

If a ship is advertised to be in danger, and the insured effects a policy "on ship or ships," knowing that the ship in danger is one of them, without stating the ships' names, this is a concealment which avoids the policy, although the rumour was false<sup>2</sup>.

And it seems that if a merchant effects a policy on ship or ships, knowing their names, but not communicating them, the policy is void; such insurance being tantamount to a representation that he does not know by what ships the goods will come<sup>3</sup>.

A ship being bound from the coast of Africa to the British West Indies, sailed to St. Thomas's on the coast of Africa, on the 2d of October, a circumstance with which the plaintiff was acquainted by a letter received in February. The policy was not made till the 21st of March. The letter was not shown, nor was any thing said of her sailing from St. Thomas's; but in the instructions "the ship was said to have been seen on the coast the 2d of October." The policy was held to be void<sup>4</sup>.

But although the rule is laid down thus generally, *that one of the contracting parties is bound to conceal nothing from the other*; yet there are many matters as to which the insured may be innocently silent. He need not mention what the underwriter knows, *Scientia utrinque par pares contrahentes facit*. It will be presumed that the underwriter is acquainted with the usage and circumstances of the branch of trade to which the policy relates; and if

<sup>1</sup> *Da Costa v. Scandret*, 2 P. Wms. 170.

<sup>2</sup> *Lynch v. Hamilton*, 3 Taunt. 27.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Racliffe and another v. Shoolbred*, Guildhall Sitt. after Trin. 1780.

the usage of the trade is general, it is immaterial for this purpose that it is not uniform. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter need not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He need not be told general topics of speculation: as for instance, the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage; the kind of seasons; the probability of lightning; hurricanes and earthquakes. He is bound to know every cause which may occasion political perils; from the rupture of states; from war, and the various operations of war. He is bound to know the probability of safety, from the continuance and return of peace; from the imbecility of the enemy; through the weakness of their councils, or their want of strength. If an underwriter insure private ships of war, by sea, and on shore, from ports to ports, and from places to places, any where, he need not be told the secret enterprises on which they are destined; because he knows some expeditions must be in view: and from the nature of his contract, he waives the information, without being told. If he insures for three years, he need not be told any circumstance to show it may be over in two: or, if he insure a voyage with liberty of deviation, he need not be told what tends to show there will be no deviation. And, as the means of information and judging are open to both, and each professes to act from his own skill and sagacity, there is no need to communicate one another's conclusions from known facts. In short, the question in cases of concealment must always be, whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement, or a concealment: fraudulent, if designed; or, if not designed, varying materially



terially the object of the policy, and changing the risk understood to be run <sup>1</sup>.

Within this principle, Lord Ellenborough was of opinion that it was not necessary, where an insurance was made on the homeward voyage, to communicate a letter from the captain, stating the damages he had encountered on the outward voyage, and describing the ship as being then unseaworthy, and standing in need of a great many repairs, as governing the time when the ship would be able to sail; for if it were so, said his lordship, it would be necessary in all cases to inform the underwriters when repairs are wanting <sup>2</sup>.

An underwriter refused to pay a loss by capture, the ship being Portuguese and condemned for having an English supercargo on board, because the insured had not disclosed that circumstance. The court held that the condemnation was unjust, and was not such a circumstance as the insured was bound to disclose <sup>3</sup>.

The third means by which policies are rendered void, is by misrepresentation.

A representation is a state of the case, not a part of the written instrument, but collateral to it, and entirely independent of it. Therefore, if a representation be false in any material point, even through mistake, it will avoid the policy, because the underwriter has computed the risk upon circumstances which did not exist. In *Pawson v. Watson* <sup>4</sup>, Lord Mansfield stated, that "there cannot be a clearer distinction than that which exists between a war-

<sup>1</sup> Per Lord Mansfield, in *Carter v. Boehm*, 3 Bur. 1905. 1 Bl. R. 593.

Lord Mansfield in the course of his argument in this case said, that if the underwriter at the time of underwriting apprehends or is aware of any suppression or omission of circumstances by the insured, he cannot take advantage of it after the loss has happened; for he ought not to have signed the policy, with a secret reserve in his own mind to make it void.

<sup>2</sup> *Beckwith v. Sydebotham*, 1 Camph. N. P. C. 116.

<sup>3</sup> *Mayne v. Walter, Easter*, 22 Geo. III. B. R.

<sup>4</sup> Cowp. 785.

ranty, which makes part of the written policy, and a collateral representation, which if false in point of materiality makes the policy void; but if not material, it can hardly ever be fraudulent.

The same rule holds if the broker conceals any thing material, although the concealment may be innocent, and the only ground for not mentioning the facts concealed was, that they appeared immaterial to him<sup>1</sup>.

But the thing concealed must be material; it must be some fact, and not a mere supposition or speculation of the insured; and the underwriter must take advantage of any misrepresentation the first opportunity, otherwise he will not be allowed to claim any benefit from it at a future period. If therefore the vessel insured is represented as expected to sail at such a time, this will not amount to a misrepresentation.

Thus, where a broker insuring several vessels, speaking of them all said, "which vessels are expected to leave the Coast of Africa in November or December;" the policy was held good, although in fact the ship in question had sailed in the month of May preceding<sup>2</sup>.

In all cases of fraud, wherever there has been an allegation of a falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether such allegation or concealment be the act of the person himself who is interested, or of his agent; for in either case the contract is founded in deception, and the policy is consequently void<sup>3</sup>.

A policy will not be set aside on the ground of fraud, unless it be fully and satisfactorily proved; and the burden of proof lies upon the person wishing to take advantage of the fraud. But though fraud will not be presumed unless it be fully and satisfactorily proved, positive and

<sup>1</sup> Shirley v. Wilkinson, B. R. Mich. 22 Geo. III. Doug. 506,

<sup>2</sup> Barber v. Fletcher, Doug. 292.    <sup>3</sup> Fitzherbert v. Mather, 1 T. R. 12.

direct proof is not to be expected : from the nature of the thing, circumstantial evidence is all that can be given<sup>1</sup>.

### 11. *Of Sea-worthiness.*

In every marine insurance, whether on ship or goods, it is a tacit and implied warranty, that the ship is, at the time of the insurance, able to perform the voyage. Any defect which may endanger the ship, though wholly unknown to the assured, will vacate the contract, and discharge the insurers from their responsibility<sup>2</sup>. But though the insured ought to know whether she was sea-worthy or not at the time she set out upon her voyage; yet, if it can be shown that the decay to which the loss is attributable, did not commence till a period subsequent to the insurance, the underwriter will be liable if she should be lost a few days after her departure<sup>3</sup>. In *Eden v. Parkinson*<sup>4</sup>, Lord Mansfield said, by an implied warranty every ship insured must be tight, staunch, and strong, but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable.

But if a ship sail upon a voyage, and in a day or two become leaky and foundered, or is obliged to return to port without any storm, or visible or adequate cause to produce such an effect, the jury may presume that she was not sea-worthy when she sailed<sup>5</sup>.

The sea-worthiness of a ship being an implied condition in a policy of insurance, it follows of course, that in entering into the engagement, it is not necessary that there should be any previous representation of the condition of the ship; because, unless it be fit for the performance of the voyage insured, there is no binding contract. But

<sup>1</sup> *Park's Insurance*, 282.

<sup>2</sup> *Ibid.* 288.

<sup>3</sup> 5 *Bur.* 2804.

<sup>4</sup> *Doug.* 732.

<sup>5</sup> *Munro and another v. Vandam*, Guildhall Sittings after Mich. 1794.

though

though a ship must be sea-worthy at the time of entering into the policy, no insufficiency of the vessel in a former voyage will vacate the policy<sup>1</sup>. So if the assured has concealed no circumstance relative to the sea-worthiness which he was required to disclose, and did not know, at the time of effecting the policy, any fact which rendered her, with reference to the risk insured, otherwise than sea-worthy, he is entitled to recover<sup>2</sup>.

But the assured cannot recover on a policy of insurance, unless the ship is equipped with every thing necessary to her navigation during the voyage; the ship must be sea-worthy; properly equipped with sails, rigging, and stores; she must be manned with a sufficient crew, and have a captain and pilot of competent skill to navigate her for the voyage insured<sup>3</sup>.

## 12. *Of Illegal Voyages.*

Whenever an insurance is made upon a voyage expressly prohibited by the common statute or maritime law of this country, the policy is void. And in such a case, it is immaterial whether the underwriter did or did not know that the voyage was illegal; because the very contract is a nullity, and a court of justice can never lend its authority to substantiate a claim founded upon a contract in direct contravention of the known and established laws of the land<sup>4</sup>. Of this opinion is Bynkershoek, who says, that even if it be told to the underwriter that the voyage is illicit, he shall not be bound; because the contract is null and void; and where that is the case, the compliance with the terms of it depends upon the will of the contracting parties merely<sup>5</sup>.

<sup>1</sup> Shoolbred v. Nutt, Guildhall Sitt. after Hil. 1782.

<sup>2</sup> Haywood v. Rogers, 4 East's Rep. 490.

<sup>3</sup> Law v. Hollingworth, 7 T. R. 100. Farmer v. Legg, 7 T. R. 186. Wedderburn et al. v. Bell, 1 Campb. N. P. C. 1.

<sup>4</sup> Camden v. Anderson, 6 T. R. 723. 1 Bos. and Pul. 273. Wilson v. Marryat, 8 T. R. 31. 1 Bos. and Pul. 430.

<sup>5</sup> Quæst. Jur. Pub. l. i. c. 21.

In the case of *Camden v. Anderson*, Lord Kenyon said, "If in the commencement of one entire voyage there be any thing illegal, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, such illegal commencement will make the whole illegal, and the assured cannot recover upon the policy." In pursuance of this principle, it has been held that if a ship be insured "at and from A. to B.," and there be any illegality in the traffic during her stay at A., the insured cannot recover on the policy for a loss happening between A. and B.<sup>1</sup> But in the same case it was held, that an insurance on the homeward voyage is not affected by the illegality of the traffic in the outward-bound voyage; and that goods purchased with the proceeds of a former illegal cargo may be the subject of insurance.

If a ship, though neutral, be insured on a voyage prohibited by an embargo laid on in time of war, such an insurance is void<sup>2</sup>.

So an insurance upon a smuggling voyage, prohibited by the revenue laws of this country, is void; but the rule has never been extended to cases against the revenue laws of a foreign state, because no country takes notice of the revenue laws of another<sup>3</sup>.

We come now to consider how far insurances upon the goods and merchandises of an enemy are legal, expedient, or political. By the common law, the insurance of enemy's property has been sanctioned; and Lord Hardwicke, in the case of *Henkle v. The Royal Exchange Assurance Company*<sup>4</sup>, observed, that there had been no determination that insurances on enemies' ships during war is unlawful. The legislature have, however, repeatedly thought it necessary to interfere to prevent these insurances<sup>5</sup>; the illegality

<sup>1</sup> *Bird v. Appleton*, 8 T. R. 562.

<sup>2</sup> *Delmada v. Motteux*, Mich. 25 Geo. III. B. R.

<sup>3</sup> *Planche v. Fletcher*, Doug. 238.

<sup>4</sup> 1 Ves. 317.

<sup>5</sup> Stat. 21 Geo. II. c. 4. and 33 Geo. III. c. 27.



and inexpediency of which have also been finally settled by two unanimous decisions of the Court of King's Bench<sup>1</sup>.

But though an insurance on the property of an enemy is illegal, yet an insurance effected on the property of an enemy by virtue of a general license to trade with such enemy is valid<sup>2</sup>. So a policy lawfully effected by a British subject on a ship belonging to an alien, and trading by virtue of a general license of the king, is good, and may be enforced by such British subject in a court of law, for the benefit of such alien owner<sup>3</sup>.

But if it be provided in such license that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond having been given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods<sup>4</sup>.

So an insurance on goods, the property of Frenchmen, shipped in France in time of peace, but exported after the commencement of hostilities, cannot be enforced against the underwriters on the restoration of peace<sup>5</sup>.

An insurance on the goods of a neutral to a neutral and friendly port is valid, although he may be resident in a place occupied by the enemy<sup>6</sup>.

So a British underwriter was held liable to the neutral owner of goods insured in a neutral ship, which was carrying enemy's property from its owner to the enemy's country, either as for a total loss, if notice of abandonment upon the loss of the voyage be given in due time; or for an average loss, if such notice be given out of time<sup>7</sup>.

<sup>1</sup> Brandon v. Nesbitt, 6 T. R. 23. Bristow v. Towers, 6 T. R. 35.

<sup>2</sup> Potts v. Bell, 8 T. R. 548.

<sup>3</sup> Kensington v. Inglis, in Error, 8 East's R. 273.

<sup>4</sup> Vandyck v. Whitmore, 1 East's Rep. 475.

<sup>5</sup> Brandon v. Curling, 4 East's Rep. 410.

<sup>6</sup> Bromley v. Heseltine, 1 Campb. N. P. C. 75.

<sup>7</sup> Barker v. Blakes, 9 East's Rep. 233.

A license to export goods to certain places within the influence of the enemy interdicted to British commerce, granted to H. N. on behalf of himself and other British merchants, &c. is sufficient to legalize an insurance on such adventure, if it appear that H. N. was the agent employed by the British merchants really interested in it to get the license, though he had no property in the goods himself<sup>1</sup>.

An insurance on ships engaged in trading to the East Indies in contravention of the statute 9 and 10 W. III. c. 44, whereby a monopoly is vested in the East India Company, is illegal<sup>2</sup>.

No insurance can be made upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, warlike stores, or provisions; for these commodities are prohibited by the laws of all nations<sup>3</sup>.

### 13. *Of Prohibited Goods.*

By the laws of almost all countries, the exportation and importation of certain commodities are declared to be illegal. If the act itself be illegal, the insurance to protect such an act must also be contrary to law; and therefore void. Agreeably to this principle, all insurances upon commodities the importation or exportation of which is prohibited by law, are void; and it makes no difference whether the underwriter did or did not know that the subject of the insurance was a prohibited commodity<sup>4</sup>.

To prevent all such insurances, the stat. 4 and 5 W. and M. c. 15: inflicts a penalty of 500*l.* on any person who, by way of insurance, shall procure the importation of any uncustomed or prohibited goods, with a like penalty on the insured. Also by the stat. 8 and 9 W. III. c. 36, the importation of any foreign alamode or lustrings, by way of

<sup>1</sup> Rawlinson et al. v. Janson, 12 East's Rep. 323.

<sup>2</sup> Camden v. Anderson, 6 T. R. 723.

<sup>3</sup> Park's Insurance, 328.

<sup>4</sup> Ibid. 329.

insurance or otherwise, without paying the duties, is expressly prohibited.

Wool being the staple manufacture of this kingdom, it was always deemed a heinous offence to export it out of the realm. But notwithstanding the provisions of numerous statutes, the practice of insuring it tended only to encourage such illicit commerce; it has therefore been restrained by divers statutes, and all insurances thereon are declared void. For the penalties for exporting wool, see page 164.

As to what goods come under the general description of prohibited goods, so as to render an insurance upon them void, it may be laid down as a general proposition, that all insurances upon goods forbidden to be exported or imported, by positive statutes, by the general rules of our municipal law, or by the king's proclamation in time of war; or which, from the nature of the commodity, and by the law of nations, must necessarily be contraband, are absolutely null and void<sup>1</sup>. But insurances on goods, the exportation or importation of which is forbidden by the revenue laws of other countries, are valid, because the foundation of the contract is not illicit<sup>2</sup>.

#### 14. *Of Wager Policies.*

An assurance being a contract of indemnity, its object is not to make a positive gain, but to avert a possible loss. Hence a policy without interest is not an assurance, but a mere wager only. Such policy, therefore, is properly denominated a wager policy<sup>3</sup>. By the law of merchants, these contracts were, till the statute 19 Geo. II. c. 37, legal contracts, provided the words, "interest or no interest" were inserted in the policy. But it being found that the indulgence given to these fictitious or gambling policies had increased to such an alarming degree as to threaten the very annihilation of that security which it was the original

<sup>1</sup> Park's Insurance, 335.

<sup>2</sup> Doug. 238.

<sup>3</sup> Selw. N.P. 1019.

intent of insurance to introduce, it was enacted by stat. 19 Geo. II. c. 37, that insurances made on ships or goods, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer, shall be null and void. The statute, however, contains an exception for insurances on private ships of war fitted out solely to cruize against his majesty's enemies; and also provides, that any merchandises or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be insured in such way or manner as if the statute had not been made.

The above provision of the statute relative to insurances from any ports or places in Europe or America, in the possession of Spain or Portugal, is founded on the regulations of those states to prohibit illicit trade. But it is loosely worded, and admits of some latitude of interpretation. Upon this section of the act it may be observed, that the equitable construction of such contracts of insurance as are protected by it, seems to be, that they may be made without interest, since in such instances it is impossible for the person insured to bring any certain proof of interest on board <sup>1</sup>.

And, in the construction of the same statute, it has been held that it does not extend to insurances of foreign property or foreign ships, but that insurances, "interest or no interest," may be made upon them <sup>2</sup>.

An insurance on the profits expected to arise from a cargo of molasses, belonging to the plaintiffs, was held to be good, although there was a clause declaring, "that in case of loss the profits should be valued at 1000 L. without any other voucher than the policy <sup>3</sup>."

Profits to arise from the sale and disposal of a cargo of goods are an insurable interest. But in such a case it is ne-

<sup>1</sup> Park's Insurance, 368.

<sup>2</sup> *Thelluson v. Fletcher*, Doug. 315.

<sup>3</sup> *Grant v. Parkinson*, Mich. 22 Geo. III. B. R.

cessary to show satisfactorily that the loss of the profits arose from a peril insured against, such as perils of the sea, &c. not from the state of the market, for which the underwriters are not responsible. In short, it is incumbent on the assured to show, that if there had been no shipwreck, there would have been some profit <sup>1</sup>.

But where not only the profits are an expectation, but the obtaining of a cargo, out of which the commission is to arise, is also an expectation, the commission of the consignee is not insurable <sup>2</sup>.

Where a house in Spain, which was indebted to the plaintiffs, had consigned goods to Messrs. Dubois, and indorsed the bill of lading to them, with a letter annexed, directing them to hold a part of the said cargo for the use of the plaintiffs, who upon getting such intelligence made the insurance in question, although they had given no orders for the goods; the court held that the plaintiffs, being creditors of the house in Spain, raised a good consideration for the assignment; and that therefore there could be no doubt that the plaintiffs had a good insurable interest <sup>3</sup>.

But all insurances made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and are void. Thus, where the defendant, in consideration of 20 *l.* paid by the plaintiff, undertook that the ship should save her passage to China that season, or that he would pay 1300 *l.* within one month after the arrival of the said ship in the river Thames; the contract was held to be void, although the plaintiff had some goods on board <sup>4</sup>.

So where the plaintiffs had lent 26,000 *l.* on bond to a captain of an East Indiaman, and had insured the ship and

<sup>1</sup> *Barclay v. Cousins*, 2 East's R. 544. *Hodson v. Glover*, 6 East's R. 316.

<sup>2</sup> *Knox v. Wood*, Mich. Sitt. at Guildhall, 1808.

<sup>3</sup> *Hill and another v. Secretan*, 1 Bos. and Pul. 315.

<sup>4</sup> *Kent v. Bird*, Cowp. 533.



cargo to that amount, and “in case of loss no other proof of interest to be required than the exhibition of the said bond,” the contract was held to be void<sup>1</sup>.

### 15. *Of Reassurance and Double Assurance.*

Reassurance is a contract which the first underwriter enters into, in order to relieve himself from those risks which he has previously undertaken, by throwing them upon other underwriters who are called reassurers.

This is a species of contract still countenanced in most parts of Europe, and was admitted in England till the 19th Geo. II. c. 37. s. 4. declared it to be unlawful to make re-assurance, unless the assurer should be insolvent, become a bankrupt, or die; and even in these cases it must be expressed in the policy to be a reassurance, and the reassurance must not exceed the amount of the sum before assured. By this statute also reassurance upon foreign ships is prohibited, unless in the three instances above mentioned<sup>2</sup>.

In France and other countries it was formerly allowed to the insured to insure the solvency of the underwriter; but this practice is not allowed in England: and though no express notice is taken of it in the above statute, it seems that such a policy would be looked upon a wager policy, and treated accordingly<sup>3</sup>.

Double assurance, which is totally different from reassurance, is where the same man is to receive two sums instead of one; or the same sum twice over for the same loss, by reason of his having made two assurances for the same property<sup>4</sup>.

The first distinction between these two contracts is, that a reassurance is a contract made by the first underwriter, his executors or assigns, to secure himself or his estate: a double

<sup>1</sup> *Lowry v. Bourdieu*, Doug. 463.

<sup>2</sup> *Andree v. Fletcher*, 2 T. R. 161.

<sup>3</sup> *Park's Insurance*, 373.

<sup>4</sup> 1 Bur. 496.

Insurance is entered into by the insured. A reinsurance, except in the cases provided for by the statute, is absolutely void. A double insurance is not void; but still the insured shall recover only one satisfaction for his loss. This requires explanation. Where a man has made a double insurance, he may recover his loss against which set of the underwriters he pleases, but he can recover no more than the amount of his loss. This depends upon the nature of an insurance, and the great principles of justice and good faith. An insurance is merely a contract of indemnity in case of loss: it follows as a necessary consequence that a man shall not recover more than he has lost, or recover a greater satisfaction than the injury he has sustained<sup>1</sup>.

It being thus settled, that the insured shall recover but one satisfaction, and that, in case of a double insurance, he may fix upon which of the underwriters he will for the payment of his loss, it is a principle of natural justice that the several insurers should all of them contribute in their several proportions, to satisfy that loss against which they have all insured<sup>2</sup>.

But though a double insurance cannot be wholly supported, so as to enable a man to receive a two-fold satisfaction, yet various persons may insure various interests on the same thing, and each to the whole value; as the master for wages; the owner for freight; one person for goods, and another for bottomry<sup>3</sup>.

If the same man for his own account, though not in his own name, insure doubly, it is still a double insurance<sup>4</sup>.

### 16. Of Changing the Ship.

It being necessary, except in some special cases, to insert

<sup>1</sup> Park's Insurance, 373.

<sup>2</sup> Newby v. Reed, Sitt. in London after Easter Vac. 1763.

<sup>3</sup> Godin et al. v. the London Ass. Comp. 1 Bur. 499. 1 Bl. Rep. 103.

<sup>4</sup> Per Lord Mansfield, ut supra.

the name of the ship on which the risk is to be run in the policy, it follows as an implied condition, that the insured shall neither substitute another ship for that mentioned in the policy, before the voyage commences, nor during the course of the voyage remove the property insured from one ship to another, without consent of the insurer, or without an unavoidable necessity. If he do, the implied condition is broken, and he cannot, in case of loss, recover against the underwriter<sup>1</sup>.

### 17. *Of Deviation.*

Deviation is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever this happens, even for the shortest space of time, the voyage is determined, and the insurers are discharged from all responsibility. Nor is it at all material whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the deviation was either with or without the consent of the assured<sup>2</sup>.

The effect of a deviation is not to avoid the contract ab initio, but only to determine it from the time of the deviation, and to discharge the insurer from all responsibility<sup>3</sup>.

If ports of call are named in the policy in a successive order, the ship must take them in the same succession in which they are named, unless some usage, or some special facts be proved to vary the general rule<sup>4</sup>.

And if the ports of call are not named in any order in

<sup>1</sup> Park's Insurance, 353.

<sup>2</sup> Ibid. 387.

<sup>3</sup> Green v. Young, 2 Lord Raym. 340. Salk. 414.

<sup>4</sup> Beatson v. Haworth, 6 T. R. 531. Marsden v. Reid, 3 East's Rep. 572.

the policy, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, not according to the shortest geographical distance<sup>1</sup>.

A ship was insured from Lisbon to England, with liberty to call at any one port in Portugal: it was held, that under such a policy the party had only a liberty to call at some port in Portugal in the course of the voyage to England<sup>2</sup>.

Liberty given to a merchant ship with a letter of marque, to chase, capture, and man prizes, does not justify her in shortening and lying to for the purpose of protecting a prize as a convoy into port<sup>3</sup>.

Neither will liberty to a merchant ship *to see prizes into port* authorise her to stay till they receive necessary repairs, which they could not otherwise procure<sup>4</sup>.

But though the consequences of a voluntary deviation are fatal to the validity of the contract of insurance, yet whenever the deviation arises from necessity, force, or any just cause, the underwriter still remains liable, although the course of the voyage is altered; for a deviation never puts an end to the insurance, unless it be the voluntary act of those who have the management of the ship<sup>5</sup>.

The circumstances that will operate as a justification for a deviation seem to be these:—To repair the vessel; to avoid an impending storm; to escape from an enemy; or to seek for convoy<sup>6</sup>.

The first ground of necessity which justifies a deviation, is that of going into a port to repair. If, therefore, a ship

<sup>1</sup> Gairdner v. Senhouse, 3 Taunt. 16.

<sup>2</sup> Hogg v. Horner, Marshall's Insurance, 597.

<sup>3</sup> Lawrence v. Sydebotham, 6 East's R. 45.

<sup>4</sup> Jarrat v. Ward, 1 Campb. N. P. C. 263.

<sup>5</sup> Elton v. Brogden, 2 Str. 1261. Scott v. Thompson, 1 New Rep. 181.

<sup>6</sup> Park's Insurance, 400.

is decayed, and goes to the nearest port to refit, it is no deviation <sup>1</sup>.

The next justification for a deviation is stress of weather. Therefore, whenever a ship, in order to escape a storm, goes out of the direct course; or when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation. It has also been held, that if a storm drives a ship out of the course of the voyage, and she does the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven <sup>2</sup>.

When the excuse for a deviation in going into a port is a necessity to procure medical assistance for the captain and crew, the assured must show that the ship was supplied with such medicines and instruments as were likely to be necessary in the course of the voyage <sup>3</sup>.

A deviation may also be justified to avoid an enemy, or to seek for convoy at the usual place of rendezvous, though such place be out of the direct course of the voyage; because it is in truth no deviation to go out of the course of the voyage, in order to avoid danger, or to obtain a protection against it, if in all cases the master of the ship fairly and bona fide act according to the best of his judgment <sup>4</sup>.

Where a captain justifies a deviation by the usage of a particular trade, there must be a clear and established usage; not a few vague instances only. But when the usage has declared it lawful in a specific voyage to go to any place, though not in the direct course from the port of loading to that of delivery, it is as much a part of the contract of in-

<sup>1</sup> *Motteux et al. v. the London Assurance Comp.* 1 Atk. 545. *Guibert v. Readshaw*, Sitt. in Lond. Hil. Vac. 1781.

<sup>2</sup> *Harrington v. Halkeld*, Sitt. in London, Mich. Vac. 1778. *Delany v. Stoddart*, 1 T. R. 22. <sup>3</sup> *Wolfe v. Claggen*, 3 Esp. Rep. 257.

<sup>4</sup> *Campbell v. Bordieu*, 2 Str. 1265. *Bond v. Nett*, Cowp. 601. *Enderby and another v. Fletcher*, Sitt. in Lond. Trin. Vac. 1780.



insurance between the parties, as if it had been particularly mentioned <sup>1</sup>.

In all cases of deviation it may be laid down as a general rule, that whenever a ship does that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and consequently as much protected by it, as if expressed in terms. And, therefore, in all cases, in order to determine whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and consequences of the act, as to the true ground of judgement <sup>2</sup>.

It has been held that if a ship deviate from necessity, the ship must pursue such voyage of necessity in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. And in such a case nothing more must be done than what the necessity requires <sup>3</sup>.

So also if a ship be insured upon a trading voyage, it is incumbent on the parties insured, to carry on that trade with usual and reasonable expedition, otherwise their conduct will amount to a deviation, and discharge the policy <sup>4</sup>.

But although an actual deviation from the voyage insured is thus fatal to the contract of insurance; yet a deviation merely intended, but never carried into effect, is considered as no deviation, and the insurer continues liable <sup>5</sup>. But if it can be shown that it never was intended by the parties to sail upon the voyage insured, and if all the ship's papers are made out for a different place from that described in the policy, the insurer is discharged from all responsibility, even

<sup>1</sup> Park's Insurance, 410.

<sup>2</sup> Park's Insurance, 411.

<sup>3</sup> Lavabre v. Walter, Doug. 281.

<sup>4</sup> Hartley v. Buggin, Mich. 22 Geo. III. B. R. Parkinson v. Collier, Sittings in B. R. after Mich. 1797.

<sup>5</sup> Foster v. Wilmer, 2 Str. 1249.

though the loss should happen before the dividing point of the two voyages<sup>1</sup>.

In a still later case the same doctrine was advanced; namely, that if a ship be insured from a day certain from A to B, and before the day sail on a different voyage from that insured, the assured cannot recover; even though she afterwards fall into the course of the voyage insured and be lost after the day on which the policy was to have attached<sup>2</sup>.

It is to be observed also that in a policy on ship and freight, it is not an implied condition that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, or otherwise increasing the risk of the underwriter. Hence where a ship was compelled in the course of her voyage to enter a port, for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her loading ports, and during her justifiable stay in the port so entered for that purpose, she took on board bullion for freight, no delay having been occasioned thereby, it was held not to avoid the policy<sup>3</sup>.

### 17. *Of Warranties.*

A warranty in a policy of insurance is a condition or a contingency, that a certain thing shall be done or happen; and unless that is performed, there is no valid contract<sup>4</sup>.

Every warranty incorporated in the body of the policy, or appearing on the face of the instrument, or inserted in any print or writing, which is by reference incorporated with the policy, must be strictly and literally complied with.

It would be endless to enumerate the various kinds of warranties which are to be found in policies; because they must

<sup>1</sup> *Woodridge v. Boydell*, Dougl. 16.

<sup>2</sup> *Raine v. Bell*, 9 East's Rep. 195.

<sup>3</sup> *Way v. Modigliani*, 2 T. R. 30.

<sup>4</sup> 1 T. R. 315.

frequently

frequently, and for the most part, do depend upon the particular circumstances of each case. The most usual kinds inserted in policies of warranties, are, 1st, As to the time of sailing; 2dly, Departing with convoy; 3dly, That the thing insured is neutral property.

*As to the time of sailing.*

If a man warrant to sail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer liable<sup>1</sup>. A detention by Government, previous to the proposed day of sailing, is no excuse for not complying with the warranty, nor a peril within the terms of the policy<sup>2</sup>. So if a warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case<sup>3</sup>.

But when a ship leaves her port of loading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, for which purpose she touches at any particular place of rendezvous for convoy, &c. her voyage must be said to commence from her departure from that port; and though she be detained at such place of rendezvous by an embargo, she has complied with the warranty; had her cargo, however, not been complete, it would not have been a commencement of the voyage<sup>4</sup>.

What shall be a departure from the port of London, or rather what is the port of London, remains yet undecided. It seems, however, that Gravesend is the limit of that port, where vessels receive the customhouse cocket, their final clearance on board, and from whence they must depart on the day mentioned in the warranty<sup>5</sup>.

<sup>1</sup> Doug. 12 in notis.

<sup>2</sup> Hore v. Whitmore, Cowp. 784.

<sup>3</sup> Veazian v. Grant, at Guildhall, Easter Vac. 1779.

<sup>4</sup> Bond v. Nutt, Cowp. 601.

<sup>5</sup> Park's Insurance, 442.

*As to departing without convoy.*

By the statute 43 Geo. III. c. 57, no ship belonging to any of his majesty's subjects (except, 1, ships not required to be registered; 2, ships licenced by the lord high admiral to depart without convoy; 3, ships proceeding with due diligence, from their port of clearance outwards, to join convoy appointed to sail from some other port; 4, ships bound to or from any place in Ireland; 5. Ships bound from one place in Great Britain to another; 6. Ships belonging to the East India or Hudson's Bay Company; 7. Ships sailing from a foreign port or place, in case there be not any convoy appointed, nor persons at such foreign port duly authorized to appoint convoys, or to grant licenses for sailing without convoy,) shall sail from any port or place without convoy, and entering into a bond, with one surety, in the penalty of the value of the ship, conditioned not to sail or depart without convoy, nor to separate without leave, on pain of a departure without convoy, or wilful separation, that the insurance on the same, or if on goods, freight, or other interest, shall be void. By s. 3. a penalty is imposed upon the master of 1000*l.*, or, in case the cargo be military or naval stores, 1500*l.* for such wilful sailing without convoy, or separating therefrom. And by s. 4. all persons settling losses upon such insurances shall forfeit 200*l.*

Upon this statute it has been held, that a ship cannot legally proceed without convoy from her port of clearance to the port of convoy in order to join convoy, unless a bond has been given according to the directions of the act, that she shall not sail without convoy<sup>1</sup>.

And where a ship has been licensed to sail without convoy, provided she is armed with a certain force, it has been

<sup>1</sup> *Hinckley v. Walton*, 3 Taunt. 131.

determined that she must take that force on board before she breaks ground <sup>1</sup>.

By the term *convoy* is to be understood a naval force under the command of a person appointed by the government of the country to which the ship sails, or by any person authorized by that government. Therefore where a ship put herself under the direction of a man of war accidentally bound on the same voyage, till she should join the convoy, which had left the usual place of rendezvous before she arrived there; it was held not to be a departure with convoy, although she, in fact, joined, and was afterwards lost in a storm <sup>2</sup>.

But if the course upon a particular voyage has been to have a relay of convoy, to protect the trade from one port to another; or if government appoint a convoy to escort the trade of a place to a given latitude and no further, and there be no other convoy on that station, a vessel taking the advantage of such a convoy, has complied with the warranty to sail with convoy for the voyage <sup>3</sup>.

How far sailing instructions from the commander of the convoy are necessary to the sailing with convoy has not been clearly decided. In point of law it seems to be clear, that a warranty to depart with convoy is not complied with, unless sailing instructions are obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained.

In the case of *Webb v. Thomson* <sup>4</sup>, Mr. Justice Buller said, If the captain from any misfortune, from stress of weather, or other circumstances, be absolutely prevented

<sup>1</sup> *Hineckley v. Walton*, 3 Taunt. 131.

<sup>2</sup> *Hibbert v. Pigou*, Easter, 23 Geo. III. B. R.

<sup>3</sup> *Smith v. Readshaw*, London Sittings after Easter, 1781. *De Garay v. Claggett*, London Sittings after Easter, 1795. *D'Equino v. Bewicke*, 2 Hen. Bl. 551.

<sup>4</sup> 1 Bos. and Pul. 5.



from obtaining his instructions, still it is a departure with convoy : but then he must take the earliest opportunity to obtain them. Generally speaking unless sailing instructions are obtained, the warranty is not complied with : the captain cannot answer signals ; he does not know the place of rendezvous in case of a storm ; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited.

Having seen what shall be deemed a convoy, let us proceed to consider what shall be a departure with convoy, within the meaning of a warranty "to depart with convoy." The clause warranted to depart with convoy, must be construed according to the usage among merchants ; that is, that the ship shall go with convoy from the usual place of rendezvous at which the ships have been accustomed to assemble ; as Spithead, or the Downs, for the port of London ; and Bluefields for the ports in Jamaica<sup>1</sup>.

Although the terms of the warranty do not express it, yet it is essentially necessary that the ship should not only depart with convoy for the whole of the voyage, but also continue with the convoy until the end of the voyage, unless she be prevented from absolute necessity<sup>2</sup>.

But if a ship is by stress of weather separated from her convoy<sup>3</sup>, or is prevented from joining it at all<sup>4</sup>, if she does all in her power to join the convoy, it will be deemed a sufficient compliance with the warranty to sail with convoy.

But it is otherwise, if the not joining be owing to the negligence and delay of the captain of the insured ship. As where repeated signals for sailing had been made the night before, and continued next day from seven o'clock till twelve,

<sup>1</sup> Lethullier's case, 2 Balc. 415. Gordon v. Morley, 2 Str. 1265. Hibbert v. Pigou, *id supra*.

<sup>2</sup> Morrice v. Dillon, Selw. N. P. 1591.

<sup>3</sup> Jeffrey v. Legendra, 3 Lev. 320. <sup>4</sup> Victoria v. Cleere, 2 Str. 1250.

notwithstanding which the ship insured did not sail till two hours after; it was held that the warranty to depart was not complied with, and that the underwriter was discharged <sup>1</sup>.

*As to Neutral Property.*

The last species of warranty above mentioned is that of neutrality; or that the ship and goods insured are neutral property. This condition is very different from either of the two former; for if this warranty be not complied with, the contract is not merely avoided for a breach of the warranty, but is absolutely void *ab initio*, on account of fraud; being a fact at the time of insuring within the knowledge of the insurer. Thus in an insurance upon goods, which the insured warranted to be neutral, the jury expressly finding that they were not neutral; the court, although the loss happened by storms, and not by capture, declared that the contract was void <sup>2</sup>.

If, however, the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutral property; because it is impossible for the insured to be answerable for the consequences of a war breaking out during the voyage. The insurer takes upon himself the risk of peace or war; they are public events, equally known to both parties <sup>3</sup>. But though it is not necessary that a ship warranted neutral should continue neutral during the whole voyage, yet she must not violate her neutrality by the misconduct of the parties on board. And, therefore, where the master and crew had, in the course of the voyage insured broken their neutrality, by forcibly rescuing the ship, which had been seized and car-

<sup>1</sup> Taylor v. Woodness, Sittings at Guildhall, Hil. Vac. 4 Geo. III.

<sup>2</sup> Woolmer v. Muilman, 3 Bur. 1419. 1 Bl. Rep. 427.

<sup>3</sup> Eden and another v. Parkinson, Doug. 722. Ty-on and another v. Cursey, 2 T. R. 477.

ried into port by a belligerent power, for the purpose of search, it was held that the assured could not recover <sup>1</sup>.

That a warranty of neutrality may be satisfied, it is necessary that the vessel should be navigated, not only according to the laws of nations, but also in conformity to the particular treaties subsisting between the country to which she belongs and the belligerent states <sup>2</sup>.

If, therefore, a state in amity with a belligerent power has, by treaty, agreed that the ships of their subjects shall only have that character when furnished with certain documents, whoever warrants a ship to be the property of such subject, should provide himself at the time when the ship sails, with those evidences, which have, by the country to which he belongs, been agreed to be necessary proofs of that character <sup>3</sup>.

And therefore in the late case of *Steele v. Lacy*, M. 5J Geo. III. C. B. which was an action upon a policy on a ship from a port in Great Britain to Riga and back again; the ship was not warranted, but only represented to be American; and having been met by a British cruiser in the course of her voyage, who demanded her passport, which she refused, was thereupon brought into port and condemned: the court held, that as she was bound to carry a passport, and as she did not produce it when demanded, it was a good cause of condemnation, and therefore the assured could not recover.

So where an American ship, insured here, was captured by a French ship, and condemned in a French court as prize, upon the express ground stated in the sentence of condemnation, that the ship was not properly documented

<sup>1</sup> *Garrells v. Kensington*, 8 T. R. 230.

<sup>2</sup> *Selw. N. P.* 1007.

<sup>3</sup> *Barzillay v. Lewis*, Trin. T. 22 Geo. III., B. R. *Rich. v. Parker*, 7. T. R. 703.

according

according to the existing treaty between France and the United States of America; it was held that the assured could not recover their loss against the British underwriter, although there was no warranty or representation that the ship was American; the neglect of the ship owners themselves, who are bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of their loss. Neither can the agent of the assured, some of whom were also interested in the cargo as well as the ship, recover for the loss of the cargo insured, which was also condemned at the same time and for the same reason; such assured of the goods being implicated in the same neglect in their character of ship owners. But it is otherwise in the case of a mere assured of *goods*, who is not answerable for the proper documenting of the *ship*, without a warranty or representation of her national character<sup>1</sup>.

But it is not necessary, in order to satisfy a warranty of neutrality, that the vessel should be navigated in conformity to an *ex parte* ordinance made by one of the belligerent states, and to which the neutral state is not a party<sup>2</sup>.

A neutral ship may carry enemy's property from its own to the enemy's country, without being guilty of a breach of neutrality; provided that neither the voyage or commerce be of a hostile description, nor otherwise expressly or impliedly forbidden by the law of this country; although such ship, in consequence of carrying enemy's property, be liable to detention on being carried into British ports for the purpose of search<sup>3</sup>.

<sup>1</sup> Bell v. Carstairs, 14 East's Rep. 374.

<sup>2</sup> Pollard v. Bell, 8 T. R. 434. Bird v. Appleton. 8 Ibid. 562.

<sup>3</sup> Barker v. Blakes, 9 East's Rep. 283.

*18. Of Return of Premium.*

In general, where property has been insured to a larger amount than the real value, the overplus premium, or, if the goods are insured to come in certain ships from abroad, but are not in fact shipped, the whole premium shall be returned. If the ship be arrived before the policy is made, the insurer being apprized of it, and the insured being ignorant of it, the insured is entitled to have his premium restored, on the ground of fraud. But if both parties are ignorant of the arrival, and the policy be lost or not lost, it seems the underwriter ought to retain it; because under such a policy if the ship had been lost at the time of underwriting, he would have been liable to pay the amount of his subscription<sup>1</sup>.

In cases where the contract of insurance is void, as on the ground of non-compliance with a warranty, e. g. to sail with convoy, sea-worthiness, or the like, and fraud cannot be imputed to the insured, he will be entitled to a return of premium; because where the contract does not attach, there is no risk<sup>2</sup>.

By the statute 23 Geo. III. c. 38. s. 47. to prevent insurance on exported wool, if the underwriter informs against the party insuring, he may retain the premium; but if the insured inform, he shall be entitled to recover it back.

With respect to the return of premium, two general rules have been established, which govern almost all cases. The first is, That where the risk not having been run is attributable to the fault, will, or pleasure of the insured, or to any other cause, the premium shall be returned. And, secondly, That where the contract is entire, whether for a

<sup>1</sup> Park's Insurance, 503.

<sup>2</sup> 3 Bar. 1240. Cowp. 668.



specific time, or for a voyage, and the risk is once commenced, and there is no contingency on which the risk is to end at any immediate period, there shall be no appointment or return of premium afterwards. Hence in cases of deviation, though the underwriter is discharged from his engagement, yet the risk being once commenced, he is entitled to retain the premium<sup>1</sup>.

Therefore where the premium is entire in a policy on a voyage, and there is no contingency at any period in the course of the outward and homeward bound voyage, upon the happening or not happening of which the risk is to end, nor any usage established upon such voyage; although there be several distinct ports at which the ship is to stop, yet the voyage is one, and no part of the premium is recoverable<sup>2</sup>.

So where a ship was insured for twelve months, but was taken within two months, it was held that no part of the premium was to be returned; because the contract was entire, and the premium being a gross sum stipulated and paid for twelve months<sup>3</sup>.

But if there are two distinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the usage, and only one of the voyages was made, the premium shall be returned on the other, though both are contained in one policy. Thus in an insurance "at and from London to Halifax, warranted to depart with convoy from Portsmouth;" but when the ship had arrived at Portsmouth the convoy was gone; it was held that the premium for the voyage from Portsmouth to Halifax should be returned<sup>4</sup>.

<sup>1</sup> 3 Bur. 1237; *Park's Insurance*. 516, 525.

<sup>2</sup> *Berman v. Woodbridge*, Doug. 781.

<sup>3</sup> *Tyrie v. Fletcher*, Cowp. 666. *Lorraine v. Thomlinson*, *ibid.* 595.

<sup>4</sup> *Stevenson v. Snow*, 3 Bur. 1237, 1 Bl. Rep. 316, S. C.

If the jury find an express usage, an apportionment of the premium shall take place <sup>1</sup>.

Where a clause was inserted that 8*l.* per cent. of the premium should be returned "if the ship sailed from any of the West India islands with convoy for the voyage and arrived;" it was held that the arrival of the ship, whether with or without convoy, entitled the party to a return of the premium stipulated <sup>2</sup>.

So also, though there had been a capture and recapture during the voyage insured <sup>3</sup>.

In all cases where the words "and arrived" follow other conditions, these words annex a condition which overrules all the other stipulations; and no arrival at any intermediate stage will do, unless the vessel arrives at its ultimate port of destination <sup>4</sup>.

When a policy is void being made without interest, contrary to the statute of the 19 Geo. II. c. 57. if the ship has arrived safe, the court will not allow the insured to recover back the premium <sup>5</sup>.

And upon the authority of *Lowry v. Bourdieu*, it has been held, that an action for money had and received will not lie to recover back the premium of reinsurance void by the above statute <sup>6</sup>.

Where a policy was made to cover a trading with the enemy, the insurance is void, and the assured cannot recover the premium <sup>7</sup>.

So where the insurance is contrary to the navigation laws. For no man can come into a British court of justice

<sup>1</sup> Per Lord Mansfield, *Long v. Allen*, Easter, 35 Geo. III. B. R.

<sup>2</sup> *Simon v. Boydell*, Doug. 255.

<sup>3</sup> *Aguilar and another v. Rodgers*, 7 T. R. 421.

<sup>4</sup> *Kellner v. Le Mesurier*, 4 East's Rep. 396

<sup>5</sup> *Lowry v. Bourdieu*, Doug. 463.

<sup>6</sup> *Andree v. Fletcher*, 3 T. R. 266.

<sup>7</sup> *Vandeyck v. Hewitt*, 1 East's Rep. 96.

to seek the assistance of the law, when he founds his claim upon a contravention of the British laws<sup>1</sup>.

An insurance having been made on goods at and from a port in Russia to London, by an agent residing here, for a Russian subject abroad, which insurance was in fact made after the commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed, and had been seized and confiscated: held that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities<sup>2</sup>.

### *19. Of Bottomry and Respondentia.*

Bottomry is a contract by which the owner or under certain circumstances (viz. in the absence of the owners, or in cases of necessity), the master of a ship borrows money to enable him to carry on the voyage, and pledges the keel or bottom of the ship, as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender. And in this case the ship and tackle if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage, then

<sup>1</sup> *Moreck v. Abel*, 3 Bos. and Pul. 35. *Lubbock v. Potts*, 7 East's Rep. 49.

<sup>2</sup> *Oom et al. v. Bruce*, 12 East's Rep. 235.

only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia*<sup>1</sup>. It may be added, that in a loan upon bottomry, the lender runs no risk though the goods should be lost; and in *respondentia*, the lender must be paid the principal and interest, though the ship perish, provided the goods are safe. In this consists the chief difference between bottomry and *respondentia*; in most other respects they are the same<sup>2</sup>.

These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; as when a man lends a merchant 1000*l*. to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case a specific voyage named in the condition be safely performed: which kind of agreement is sometimes called *foelus nauticum*, and sometimes *usura maritima*. But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37. that all moneys lent on bottomry or at *respondentia*, on vessels bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandise; that the lender shall have the benefit of salvage; and that if the borrower has not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as has not been laid out, with legal interest and all other charges, though the ship and merchandise be totally lost<sup>3</sup>.

This statute has entirely put an end to that species of contract which arose from a loan upon the mere voyage

<sup>1</sup> 2 Bl. Com. 457.

<sup>2</sup> Park's Insurance, 552.

<sup>3</sup> 2 Bl. Com. 458.  
itself,

itself, as far, at least, as relates to India voyages. But as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may still be made in all other cases, as at common law, except in the following instance, which is another statutory prohibition. This statute (7 Geo. I. c. 21. s. 9.) declares, that all contracts made or entered into by any of his majesty's subjects, or any person in trust for them, for or upon the loan of any moneys by way of bottomry, on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or places beyond the Cape of Good Hope (mentioned in the statutes relating to the East India Company), shall be null and void.

This act, it should seem, does not extend to prevent British subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the East Indies. The purpose of the statute was only to prevent the people of this country from trading to the British settlements in India under foreign commissions; and to encourage the lawful trade thereto<sup>1</sup>.

The contract of bottomry and *respondentia* seems to deduce its origin from the custom of permitting the master, when in a foreign country, to hypothecate the ship and goods, in order to raise money to refit, or for necessaries<sup>2</sup>. But he cannot do either for any debt of his own; but merely in cases of necessity, and for completing the voyage<sup>3</sup>. And to justify such an act of the master, the ship must be abroad. Molloy in express terms declares, that a master has no power to take up money on bottomry, in places where his owners dwell; otherwise he and his estate must be liable thereto<sup>4</sup>.

<sup>1</sup> Park's Insurance, 554.

<sup>2</sup> 2 Bl. Com. 457. 3 Rob. Adm. Rep. 240. 1 Salk. 34.

<sup>3</sup> Molloy, b. 2. c. 2. s. 14. <sup>4</sup> B. 2. c. 11. s. 11.



The principle upon which bottomry is allowed, is, that the lender runs the risk of losing his principal and interest ; and therefore it is not usury to take more than the legal rate <sup>1</sup>. But if a contract were made under colour of bottomry, in order to evade the statute against usury, it would then be usurious <sup>2</sup>. And as the hazard to be run is the very basis and foundation of the contract, it follows, that if the risk be not run, the lender is not entitled to the extraordinary premium <sup>3</sup>.

The risks to which the lender exposes himself are generally mentioned in the condition of the bond ; and are nearly the same as those against which the underwriter, in a policy of insurance, undertakes to indemnify. It has been determined that piracy is one of these risks <sup>4</sup>; and that if a loss by capture happen, the lender cannot recover against the borrower. But in bottomry and respondentia a capture does not mean a temporary taking, but it must be such as to occasion a total loss. And therefore where a ship was taken and detained for a short time, and yet arrived at the port of destination within the time limited, it was held that the bond was not forfeited, and the obligee might recover <sup>5</sup>. In the same case it was also settled, that a lender on bottomry, or at respondentia, is neither entitled to the benefit of salvage, nor liable to contribute in case of a general average ; for which reason the statute 19 Geo. II. c. 37. above-mentioned, contains a positive provision to allow the benefit of salvage, in the cases there mentioned. If, however, a man insure respondentia interest on a foreign ship, and be obliged to contribute to an average-loss, by

<sup>1</sup> Park's Insurance, 558.      <sup>2</sup> 4 Com. Dig. 193. 2 Ves. 146.

<sup>3</sup> Deguiller v. Depeister, 1 Vern. 263.      <sup>4</sup> Barton v. Wolliford, Comb. 56.

<sup>5</sup> Joyce v. Williamson, Mich. 23 Geo. III. B. R.

the laws of her country, English underwriters are bound to indemnify <sup>1</sup>.

The lender is not liable for accidents arising from the misconduct of the borrower, or of the captain. If, therefore, a ship be lost by wilful deviation from the tract of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation; as she was not lost by a peril to which the lender agreed to make himself liable <sup>2</sup>.

So as bottomry bonds generally express from what time the risk shall commence; if a ship receive injury by storm, fire, &c. before the beginning of the voyage, the person borrowing alone runs the hazard; for the contingency does not commence till the departure. But if the condition be, "that if the ship shall not arrive at such a place by such a time, then, &c." in these instances, the contract commences from the time of sailing, and a different rule, as to the loss, will necessarily prevail <sup>3</sup>.

Bottomry and respondentia may be insured, provided it be specified in the policy to be such interest. And by statute 19 Geo. II. c. 37. the lender alone can make such insurance; and the borrower can only insure the surplus value of the goods over and above the money borrowed. But money expended by the captain for the use of the ship, and for which respondentia interest is charged, may be recovered under an insurance on goods, specie, and effects, provided it is sanctioned by the usage of trade <sup>4</sup>. Finally, where a person insures a bottomry interest, and re-

<sup>1</sup> *Walpole v. Ewer*, Sitt. after Trin. 1789.

<sup>2</sup> *Western v. Wildy*, Skin. 152. Holt's Rep. 126. 1 Eq. Ca. Abr. 372. 2. Ch. Cas. 130.

<sup>3</sup> *Beawes's Lex. Merc.* 127.

<sup>4</sup> 1 *Glover v. Black*, 3 Bur. 1394. 1 Bl. Rep. 405. *Gregory v. Christie*, ante,

covers upon the bond, he cannot also recover upon the policy<sup>1</sup>.

#### AVERAGE.

Average signifies a mean proportion of loss between the owners of goods thrown overboard in a storm, in order to preserve the remainder, and the proprietors of those that are saved, and of the vessel<sup>2</sup>.

This principle of general contribution is derived from the ancient law of Rhodes, and has been adopted by all commercial nations. The rule of the Rhodian law is this: "If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all<sup>3</sup>." In order to make the act of throwing overboard legal, it must be the effect of deliberate intention: for if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship, by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard to lighten the ship: if they are cast overboard by the wanton caprice of the crew or passengers, they, or the master, or the owners of the ship, must make good the loss. The goods must be thrown overboard for the sake of all: not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods; but, because at a moment of distress and danger, their weight, or their presence, prevents the extraordinary exertions required for the general safety<sup>4</sup>.

If the jettison (that is the throwing over of the goods) does not save the ship, but she perish in the storm, there

<sup>1</sup> Park's Insurance, 570.

<sup>2</sup> Beawes's Lex Merc. 163.

<sup>3</sup> Dig. 14. 2. 1.

<sup>4</sup> Abbott's Law of Merchant Ships, &c. 328.

shall be no contribution of such goods as may happen to be saved. But if the ship, being once preserved by such means, and continuing her course, should afterwards be lost, the property saved from the second accident, shall contribute to the loss sustained by those whose goods were cast out upon the former occasion <sup>1</sup>.

The various accidents and charges, which will entitle the suffering party to call for a contribution, cannot easily be enumerated; but it may be laid down as a general principle, that all losses sustained and expenses incurred voluntarily and deliberately, with a view to prevent the total loss of the ship and cargo, ought to be equally borne by the ship and her remaining lading <sup>2</sup>.

If goods be put on board a lighter to enable the ship to sail into harbour, and the lighter perish, the owners of the ship and the remaining cargo are to contribute. But if the ship should be lost, and the lighter saved, the owners of the goods preserved are not to contribute to the proprietors of the ship and cargo lost <sup>3</sup>.

It is not only the value of the goods thrown overboard that must be considered in a general average; but also the value of such as receive any damage by wet, &c. from the jettison of the rest <sup>4</sup>.

And not only may the loss of goods become the subject of general contribution, but also in some cases the expense incurred in relation to them <sup>5</sup>. Thus if it be necessary to unlade the goods in order to repair the damage done to a ship by tempest, so as to enable it to prosecute and complete the voyage, it seems that the expense of unlading, warehousing, and reshipping the goods, should be sustained

<sup>1</sup> Park's Insurance, 172.

<sup>2</sup> Park's Insurance, 173.

<sup>3</sup> 2 Magens, 96, 183. Molloy, tit. Average, s. 12.

<sup>4</sup> Beawes's Lex Merc. 148. Molloy, b. 2. c. 6. s. 8.

<sup>5</sup> The Copenhagen, 1 Rob. Adm. Rep. 289. *Da Costa v. Newnham*, 2 T. R. 407. *The Gratiudine*, 3 Rob. Adm. Rep. 357.

by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage <sup>1</sup>.

The term "goods" extends to the ship and its furniture, its provisions, guns, boat, or other tackle <sup>2</sup>.

By the law of most of the continental nations of Europe, the injury done by one ship to another, or to its cargo, by mere misfortune and without fault in the persons belonging to either ship, is to be equally borne by the owners of the two vessels; but by the law of England, in the case of damage happening in this manner, the proprietors of the ship or cargo injured must bear their own loss <sup>3</sup>.

If the ship ride out the storm, and arrive in safety at the port of destination, the captain must, as soon as possible, make regular protests, and must swear, in which oath some of the crew must join, that the goods were cast overboard for no other cause, but for the safety of the ship and the rest of the cargo <sup>4</sup>.

If a ship be taken by force, carried into some port, and the crew remain on board to take care of and reclaim her, not only the charges of reclaiming shall be brought into a general average, but the wages and expenses of the ship's company during her arrest, and from the time of her capture <sup>5</sup>. But an allowance will not be made under general average for sailors' wages and victuals during performance of a quarantine <sup>6</sup>.

It seems agreed, that extraordinary wages and victuals expended during a detention by a foreign prince not at war, may be brought into a general average, so as to charge the underwriter, if such expenses were necessary and unavoidably incurred for the general safety of the ship and

<sup>1</sup> Abbott's Law of Merchant Shipping, 333.

<sup>2</sup> Ibid.

<sup>3</sup> *Boiler v. Fisher*, Guildhall Sitt. after Mich. T. 40. Geo. III.

<sup>4</sup> Beawes's Lex Merc. 148. Molloy, b. 2. c. 6. s. 2.

<sup>5</sup> Beawes's Lex Merc. 150. 1 Magens, 67.

<sup>6</sup> 1 Magens, 67.



cargo<sup>1</sup>. As also wages and provisions expended during a detention to repair<sup>2</sup>.

So when a ship is obliged to go into a port for the benefit of the whole concern, the charges of loading and unloading, and the wages and provisions of the workmen hired for the repairs, are a general average<sup>3</sup>.

By the ancient laws of Rhodes, Oleron, and Wisbny, the ship and all the remaining goods shall contribute to the loss. Diamonds, jewels, gold, and silver, when a part of the cargo, must contribute according to their value. But ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, bottomry or respondentia bonds, and the wages of the sailors, shall not any of them contribute<sup>4</sup>.

In order to fix a right sum on which the average or contribution may be computed, and which in general is not to be made till the ship's arrival at her port of discharge, it is to be considered, what the whole ship, freight, and cargo would have produced net, if no jettison had been made; and then the ship, freight, and cargo are to bear an equal and proportionable part of the loss. According to the custom of the merchants of England, the goods thrown overboard are to be estimated at the price for which the goods saved were sold, freight and all other charges being first deducted<sup>5</sup>.

Where goods are shipped on an invoice, an average loss upon a policy must be calculated upon the invoice price, and not upon the price of the market at which the damaged goods are arrived<sup>6</sup>.

If sails are blown away, or masts or cables broken by the

<sup>1</sup> 1 Magens, 67.

<sup>2</sup> Park's Insurance, 174.

<sup>3</sup> Beawes's Lex Merc. 150.

<sup>4</sup> Molloy, b. 2. c. 6. s. 4. 1 Magens, 71.

<sup>5</sup> 1 Magens, 69. Molloy, tit. Average, s. 15.

<sup>6</sup> Waldron v. Coombe, 3 Taunt. 162.

violence of the wind, the owner alone must bear the loss <sup>1</sup>. But if the master is compelled to cut away and abandon his masts, sails, or cables, to preserve and lighten his ship, their value must be made good by contribution <sup>2</sup>.

The contribution is in general not made till the ship arrives at the place of delivery; but accidents may happen, which may cause a contribution before she reach her destined port <sup>3</sup>.

Small or petty averages are the next species. These consist of such charges as the master is obliged to pay by custom for the benefit of the ship and cargo; such as pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, signals, instructions, passage-money by castles, expenses for digging a ship out of the ice, and at London, by custom, the fee paid at Dover pier <sup>4</sup>.

The term is also used for a small duty which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention for the goods so entrusted to him <sup>5</sup>.

For these charges the insurers are never answerable; but one third of the expenses is borne by the ship, and two thirds by the cargo. But in order to discharge the insurer it must appear that the disbursements were usual and customary in the voyage: for if they were incurred for any extraordinary purpose, or in order to relieve the ship and cargo from some impending danger, they shall then be reputed a general average, and consequently be a charge upon the insurer. In lieu of these petty averages, it has become usual at some places to pay five per cent. calculated on the freight, and five per cent. more for primage to the captain <sup>6</sup>.

<sup>1</sup> Wellwoods Sea Laws, tit. 17.

<sup>2</sup> Abbott, 334.

<sup>3</sup> *Roccus de Navibus*, Not. 96. 1 Magens, 60.

<sup>4</sup> 2 Magens, 189. 278.

<sup>5</sup> *Park's Insurance*, 131.

<sup>6</sup> 1 Magens, 72.

## OF SALVAGE.

Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies : and it is also sometimes used to signify the thing itself which is saved <sup>1</sup>.

The propriety and justice of such an allowance must be evident to every one ; for nothing can be more reasonable than that he, who has recovered the property of another from imminent danger by great labour, or perhaps at the hazard of his life, should be rewarded by him, who has been so materially benefited by that labour <sup>2</sup>. Accordingly, all foreign codes of maritime law, both ancient and modern, contain provisions and enactments on this head. In some of them the value to be paid is fixed at a certain portion of the article saved, or of their value, according to their nature and quality, or the circumstances of the case. The laws of Rhodes fixed the rates of salvage in several instances, sometimes giving for salvage one-fifth of what was saved ; at other times only a tenth ; and at others one-half. The regulations of Oleron left it more unsettled, and declared that the courts of judicature should award to the salvors, such a proportion of the goods saved, as they should think a sufficient recompense for the service performed, and the expense incurred <sup>3</sup>. Almost every state has regulations on this head peculiar to itself ; the law of England, like the laws of Oleron, has fixed no positive rule or rate of salvage, but directs only as a general principle, that a reasonable compensation shall be made <sup>4</sup>.

When goods have been either abandoned in distress at sea, or cannot be protected and secured, by the common law of England the salvor is entitled to retain the possession of them, until a proper compensation is made to him for

<sup>1</sup> Beawes's *Lex. Merc.* 146.

<sup>2</sup> Kaim's *Princ. of Eq. Introd.* 6.

<sup>3</sup> *Leg. Rhod.* s. 2. art. 45. *Leg. Oleron*, art. 4.

<sup>4</sup> Wellwood's *Sea Laws*, tit. 24.

for his trouble<sup>1</sup>. This compensation, if the parties cannot agree upon, may, by the same law, be ascertained by a jury in an action brought by the salvor against the proprietor of the goods; or the proprietor may tender to the salvor such sum of money as he thinks sufficient, and upon refusal to deliver the goods, bring an action of detinue or trover against the salvor; and if the jury think the sum tendered sufficient, he will recover his goods or their value, and the costs of his suit. If the salvage is performed at sea, the Court of Admiralty has jurisdiction over the subject, and will fix the sum to be paid, and adjust the proportions, and take care of the property pending the suit; or if a sale is necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors according to reason and equity. And in fixing the rate of salvage, this Court usually has regard not only to the labour and peril incurred by the salvors, but also to the situation in which they may happen to stand with respect to the property saved, to the promptitude and alacrity manifested by them, and to the value of the ship and cargo, as well as the degree of danger from which they were rescued<sup>2</sup>.

In the case of a homeward bound West India ship, taken by the French near the coast of Jamaica, while proceeding from Savannah le Mar to Bluefields to join convoy, and recaptured by persons going in boats from the shore, one-sixth was allowed for salvage; and as the voyage homeward, and consequently the right to freight, had commenced, and the freight was ultimately earned, the salvage was paid upon the freight as well as the ship and cargo<sup>3</sup>.

In the case of a slave-ship rescued from insurgent slaves

<sup>1</sup> *Hartford v. Jones*, 1 *Ld. Raym.* 393. *Baring and others v. Day*, 3 *East's Rep.* 51. 2 *Salk.* 354.

<sup>2</sup> *The William Beckford*, 3 *Rob. Adm. Rep.* 355.

<sup>3</sup> *The Dorothy*, 6 *Ibid.* 88.

on the coast of Africa, by another vessel employed in the same trade, one-tenth of the value was allowed<sup>1</sup>. In the case of a Danish ship, deserted by its crew on the English coast, and brought into Harwich without any considerable danger, two-fifths were decreed for salvage<sup>2</sup>. In the case of another ship, which having struck upon a rock, lost her rudder, had her bottom beaten in, and been deserted by the crew, was weighed off with great peril by one set of persons, and placed in such a situation as to enable the master to bring off some bullion, but which afterwards sunk, and was again weighed up and brought into Harwich by another set of persons, two-thirds were decreed, and the amount distributed among the first and second set of salvors<sup>3</sup>. But the Court will not suffer a claim of salvage to be ingrafted on the local ignorance of foreigners, who cannot be expected to be well acquainted with our coast, although a recompense must be made for the service actually rendered to them<sup>4</sup>. Neither will merely preventing a ship from entering an enemy's port entitle the captors to salvage<sup>5</sup>. Nor is a passenger entitled to make a claim for the ordinary assistance he may be enabled to afford to a vessel in distress. A passenger, however, who has rendered any very extraordinary services, will be entitled to salvage. A ship bound to the West Indies, struck upon the shoals of Chichester, in a gale of wind, and in that situation was deserted by the master, who took part of the crew with him. A person who had commanded in the same trade, and was then on board as a passenger, took the command of the ship by the desire of the passengers, and with the consent of the mate and the remainder of the crew, and carried her back in

<sup>1</sup> The *Trelawney*, 4 Rob. Adm. Rep. 223.

<sup>2</sup> The *Fortuna*, 4 Ibid. 193.

<sup>3</sup> The *Jonge Bastiaan*, 5 Ibid. 322.

<sup>4</sup> The *Vrouw Margaretha*, 4 Ibid. 103.

<sup>5</sup> The *Frankling*, 4 Ibid. 147.



safety to Ramsgate harbour. By the direction of Lord Alvanley, the jury found him entitled to 400*l*.<sup>1</sup>

We now proceed to the consideration of salvage payable upon the recapture of ships or goods the property of the subjects of this country from the enemy.

It may be taken as a general proposition, liable only to one exception, that the ships or goods of the subjects of this country taken at sea by an enemy, and afterwards retaken at any indefinite period of time, and whether before or after sentence of condemnation, are to be restored to the original proprietors upon payment of salvage to the recaptors.

By the statutes 13 Geo. II. c. 4, 17 Geo. II. c. 34, and 29 Geo. II. c. 34. the legislature fixed and ascertained the rate of salvage, in case of a recapture, proportioning the amount of the reward to the length of time the ship or goods had been in the possession of the enemy, because the longer they remained in the hands of the enemy, so much the less was the hope of recovery. At the same time, however, those statutes fixed a boundary, beyond which the allowance should not pass; namely, that in no case whatever should the recaptors be entitled to more than a moiety of the property rescued from the enemy.

But the statute 33 Geo. III. c. 66. s. 42. has fixed the rate of salvage at one-eighth for the royal navy, and at one-sixth for private ships: and in case of recapture by the joint operation of his Majesty's ships and private ships, authorized the judge of the Court of Admiralty to order such salvage as he should deem fit and reasonable. But the same statute enacts that recaptured ships, set forth by the enemy as vessels of war, shall wholly belong to the recaptors, and not be restored to the original owners.

The same rate of salvage is fixed by the statutes 43 Geo. III. c. 160. s. 39 and 41, and 45 Geo. III. c. 72.

<sup>1</sup> Newman v. Walters, 3 Bos. and Pul. 612.

s. 7, for his Majesty's hired armed ships, as for the royal navy.

A convoying ship may be entitled to salvage for the recapture of a vessel which had been taken while under its protection'. In this case Sir William Scott said, 'The only material question for me to consider is, whether there was such a capture made by the enemy as would found a case of recapture. Many cases might be put of the effect of recapture, to show, that it is by no means necessary that the possession by the enemy should be *long* maintained, or at any particular distance from the convoying ship. The question will always be, whether it was an effectual possession, and such as would suspend the relation of the convoying ship; *not*, whether it is a *complete* and firm possession, which, for some purposes is, in contemplation of law, not held to be effected till the prize is carried *infra præsidia*. The rule of *infra præsidia*, however, is certainly not the measure to be applied to questions of this kind: the very clause of the Prize Act alludes to cases of salvage, in which no such complete possession is supposed, since it speaks of vessels being recaptured, and permitted to continue on their original voyage. As little can it be contended that the vessel should have been out of sight to found a case of recapture: it will be sufficient if there has been that complete and absolute possession, which supersedes the authority of the convoying ship.

With respect to neutral property recaptured by the subjects of this country from the enemy, by the ancient prize law of Great Britain, it was not subject to salvage. But in consequence of the violent conduct and notorious injustice of France during the last war, the prize courts of that country having proceeded without any pretence of sanction from the law of nations, to condemn neutral property, it was not

<sup>1</sup> The Wight, 5 Rob. Adm. Rep. 215.

thought unreasonable by neutrals themselves, that salvage should be paid for deliverance from French capture<sup>1</sup>.

But this deviation from the general rule, viz. that neutral property recaptured is not subject to salvage, is not applied in recaptures from those states which have always adhered to the principles of the prize system with its accustomed regularity and honour. And therefore, on a recapture from a Spanish cruizer of a cargo of naval stores on a destination to Malta, on the account of the American government, and for the supply of an American squadron, and not *lucranda causâ*, or consigned to English possessions and English use, the captors are not entitled to salvage<sup>2</sup>.

In the case of the recapture of the property of allies of this country from a common enemy, by the subjects of this country, the rule is, that England restores on salvage to its allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule. "The maritime law of England," said Sir William Scott<sup>3</sup>, "having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle; in such a case it adopts their rule, and treats them according to their own measure of justice." In conformity to this rule, the *San Jago* was not restored to the king of Spain, because retaken from his then enemy the French, under circumstances in which the Spanish Courts had condemned British property retaken by the Spaniards: and shortly afterwards two Portuguese ships were for the same reason condemned; and several others at the same time restored,

<sup>1</sup> *The Two Friends*, 1 Rob. Adm. Rep. 231. *The Eleonora Catharina*, 4 Ibid. 156.

<sup>2</sup> *The Huntress*, 6 Ibid. 104.

<sup>3</sup> *Santa Cruz*, 1 Rob. Adm. Rep. 63.

because

because in the interval between the different captures, an ordinance of the Court of Portugal had altered the rule of restitution in that country, and they were restored upon payment of the rate of salvage established in Portugal ; viz. one-eighth to king's ships, and one-fifth to privateers<sup>1</sup>.

#### OF PARTNERSHIP.

##### 1. *Of the Nature of Partnership.*

Mercantile associations are either public or private, and for the purpose of carrying on lawful trade and commerce, all partnerships are valid. To this rule, however, there is an exception in the case of marine insurances. For by the statute 6 Geo. I. c. 18, all societies and partnerships, except the Royal Exchange and London Assurance companies, are prohibited from granting, signing, or writing any policy of insurance, or making any contract for assurance, of, or upon, any ship or ships, goods or merchandises at sea, or going to sea, and from lending any moneys by way of bottomry.

Of public partnerships, some are incorporated by letters patent, or act of parliament, such as the East India Company, the Bank of England, &c. ; others are not, such as most of the fire and life insurance companies.

The laws affecting these public companies or societies, when not confirmed by public authority, are the same as in common partnerships, the partners being liable for the debts of the company without any limitation. But when incorporated by royal charter or act of parliament, the members are not liable in their individual capacities, on account of the joint trade, but only for their respective shares or interest in the joint stock, their risk being limited by the express provisions of the charter.

To constitute a private partnership, the bare consent of

<sup>1</sup> Santa Cruz, 1 Rob. Adm. Rep. 63.

the parties concerned, certified by acts or contracts, is sufficient without any articles of copartnership or express agreement entered into by them, provided they appear ostensibly to the world as joint traders <sup>1</sup>.

If a person suffers his name to be used in a business, and holds himself out as a partner, he is to be considered, whatever the agreement may be between him and the other partners, and although it was not known at the time of the dealing that he was a partner, or that his name was used <sup>2</sup>.

And the law is the same with respect to dormant or sleeping partners, who, when discovered, are liable to the partnership debts; because were they not subject to the risk, their profits in the partnership would be of an usurious nature <sup>3</sup>.

If two or more persons agree between themselves to take jointly the profits, and bear equally the loss, in any trade, it shall, upon principles of general policy, be deemed a partnership in general, with respect to strangers or the world <sup>4</sup>.

But though a participation in the profits of the trade will constitute a partnership between the parties and strangers, yet to constitute a partnership between the parties themselves, they must have joint shares in the stock, and must be jointly interested in the trade or adventure <sup>5</sup>.

When a person who has retired from a partnership concern, receives from the profits of the trade a casual indefinite advantage, depending on accidents, as an annuity during the life of the person who exercises the trade, he will be deemed a partner, especially if he reserves a right of inspecting the books <sup>6</sup>. But if a person retiring from business reserves a certain and defined profit, or premium, as an annuity for

<sup>1</sup> Co. Lit. 11 b. 2 Rol. Abr. 114.      <sup>2</sup> Young v. Axtell and another, Guildhall Sittings after Hil. 24 Geo. III.

<sup>3</sup> Hoare v. Dawes, Doug. 371.

<sup>4</sup> Metcalf v. the Royal Exch. Ass. Comp. Barnard 343.

<sup>5</sup> Hesketh v. Blanchard and another, 4 East's Rep. 114.

<sup>6</sup> Bloxham v. Pell. 2 Bl. Rep. 999.



a certain number of years, together with legal interest for the loan of the capital originally vested in the partnership concern, it is not a continuance of the partnership <sup>1</sup>.

And this liability is not obviated by an agreement entered into between the partners, that neither shall be answerable for the acts or losses of the other, but each for his own; for though with respect to each other they are not considered as partners, yet if they have a mutual interest in the profit and loss, they become liable as partners to all persons with whom either contracts <sup>2</sup>.

Only the partners to a contract are considered as partners. Therefore if a man subdivides his beneficial interest under a partnership agreement among others, he alone is liable to the performance, and the subcontract does not constitute a partnership <sup>3</sup>.

So if a person, though not a broker or factor, is employed to sell goods, and is to have for himself whatever money he can procure beyond a certain sum, he is not a partner with the owner of the goods, as there is no participation of profit and loss between them, his profit not arising from the profit of the principal, but being collateral to and beyond it <sup>4</sup>.

If a contract be entered into which is in its conditions immoral, or a violation of the general laws of public policy, as if an agreement purporting to be, or assuming the shape of a partnership in trade, be entered into for a single dealing, by which one of the partners advances a sum of money for the purchase of particular goods, stipulating at the same time to have half the profits upon a resale of such goods, if the profits exceed 5*l.* per cent., and the principal is not risked, such partnership contract is not binding <sup>5</sup>.

So, no action lies on a bond for securing money lent at

<sup>1</sup> *Grace v. Smith*, 2 Bl. Rep. 998.

<sup>2</sup> *Waugh v. Carver and others*, 2 Hen. Bl. 235.

<sup>3</sup> *Coope v. Eyre*, 1 Ibid. 37.

<sup>4</sup> *Benjamin v. Porteus*, 2 Ibid. 590.

<sup>5</sup> *Jestons v. Brooke*, Cowp. 793.

5*l.* per cent., together with a portion of the trade ; for such an agreement is contrary to the principle on which the partnership contract must be founded, viz. reciprocal risks and advantages<sup>1</sup>. And yet the obligee of such bond will be subject to all the debts accruing from such partnership.

In all cases of special partnerships, which are formed for a particular concern, or for a single dealing or adventure, though the persons forming them have all the rights, and are subject to all the liabilities of partners, yet the relation of copartnership between them ceases with the consummation of such single dealing or adventure, and at no time extends to any of their other concerns.

With respect to the division of the profit and loss derived from a partnership concern, where the proportion of capital, stock, labour, and skill of the partners are equal, the division of the gain or loss will be equal ; where they have contributed unequally, the distribution of their respective shares in the gain or loss must be regulated according to the stipulated proportions, and the different conditions of the partnership.

## *2. Of the Liabilities of Partners with reference to each other.*

As to the interest which partners have by law in the goods or capital which they contribute at the commencement of the partnership, or acquire in the course of trade ; it is held by the *legem mercatoriam*, that partners are either tenants in common of the partnership effects, or joint tenants without benefit of survivorship : for in all undertakings upon hazard of profit or loss, the *jus accrescendi*, or benefit of survivorship, is never allowed<sup>2</sup>. And in whatever proportion each individual partner may contribute, or whether the partnership be general, or only for a particular adventure, the

<sup>1</sup> *Morse v. Wilson*, 4 T. R. 253.

<sup>2</sup> Co. Lit. 182.

partners have all the same species of interest in the stock in trade. And after an agreement executed between the parties, the stock and effects which are put into partnership become common to all the parties, although they are not delivered, but remain in possession of that partner who was the sole owner of them before the partnership commenced<sup>1</sup>.

And this community of interest extends not only to such particular stock as may be brought into trade at the time of entering into partnership, but to all such as may at any time arise in the course of the partnership dealings<sup>2</sup>. But to whatever share a partner may be entitled, he has no exclusive right to it until a balance of accounts be struck between him and his copartners<sup>3</sup>.

How far the acts of one partner are binding upon his copartners, the general rule of law is, that if the act concerns the partnership trade or business, it binds all, unless there be an express previous dissent; but if such act do not concern the partnership trade, or be not in the usual course of trade, as signing a deed, &c. it shall not be binding on the rest, but by their assent express or implied<sup>4</sup>.

As to the power of transferring any house or real estate held for the purposes of partnership business, no partner can dispose of more than his own share in such property. Neither will a general partnership agreement, though under seal, authorize partners to execute deeds for each other, unless a particular power be given for that purpose<sup>5</sup>. But with regard to all effects contributed, manufactured, or purchased, to be sold for the benefit of the partnership, a sale thereof by one of several copartners is equally valid as if they had all been present at the time the bargain was made, and had given their assent to it, provided there was no collusion on

<sup>1</sup> Domat. Edit. 1772, b. 1. tit. 8. s. 3.

<sup>2</sup> Skipp v. Harwood, 1 Ves. 242.

<sup>3</sup> Smyth v. De Sylva, Cowp. 471.

<sup>4</sup> 1 Salk. 126. 4 T. R. 313. 6 Ves. Jun. 602. 7 East's Rep. 210. 10 Ibid. 264. 7 T. R. 207.

<sup>5</sup> Harrison v. Jackson, 7 T. R. 207.

the part of the vendee. So although one partner cannot bind his copartners by deed, without an authority by deed, yet, in the course of mercantile transactions, one partner may, by drawing, accepting, or indorsing bills of exchange or promissory notes, in the name, or as on the behalf of the firm, bind the rest even without their knowledge or assent<sup>1</sup>.

A new partner, however, cannot be bound in this manner for an old debt incurred by the other partners before the new partner was taken into the firm<sup>2</sup>.

A secret act of bankruptcy committed by one partner does not take away the power of the others to dispose bona fide of the goods which belonged to them. Thus, in the case of *Fox v. Hanbury*, it was held, that if one of two partners become bankrupt, the solvent partner may, if for a valuable consideration and without fraud, dispose of the partnership effects; and that if he afterwards fail, the assignees, under a joint commission against both, cannot maintain trover against the bona fide vendee of such partnership effects<sup>3</sup>.

The property in partnership effects may be transferred not only by the acts of the partners, but by operation of law. This happens either by means of bankruptcy or by the effect of legal process directed against the goods of partners in a civil action. Where there is execution against one of several partners, the sheriff must seize all the goods, and sell a moiety thereof undivided<sup>4</sup>. And, therefore, though the creditor of any one partner may take in execution the partner's interest in all the tangible property of the partnership, yet an account must be taken before the fruits of an execution upon the partnership effects can be reaped<sup>5</sup>.

But it is in equity only that relief can be obtained in

<sup>1</sup> *Swan v. Steele*, 7 East's Rep. 210. *Ex parte Bonbonus*, 8 Ves. Jun. 542.

<sup>2</sup> *Sheriff v. Wilks*, 1 East's Rep. 48.

<sup>3</sup> *Cowp.* 445.

<sup>4</sup> *Heydon v. Heydon*, 1 Salk. 392. *Jackey v. Butler*, 2 Ld. Raym. 871.

<sup>5</sup> *Taylor v. Field*, 4 Ves. Jun. 396.

such cases. A court of law has no right to restrain against partnership effects, or to direct an inquiry into the interest of the partner who is sued, as also of the several claims upon the partnership property. If the other partners therefore are desirous to remove the inconvenience of the execution and prevent the sheriff from disposing of the property seized under it, they must file a bill in equity against the vendee of the sheriff <sup>1</sup>.

As to the controul of partners over the partnership property, it depends upon the articles of partnership. But if there has been no express stipulation between them, the majority must decide as to the disposition and management of the partnership concerns. Ships are, however, an exception to the rule, that the consent of all parties is necessary to partnership; for one part-owner may, at any time, against the will of the rest, sell or assign his share of the ship, and clothe the assignee with all the rights and privileges which he himself enjoyed <sup>2</sup>. But where the several parties became part-owners in a ship under a fixed contract for the employment of it; or where, by common consent, they delegate the management of it to one of them, who, by a very intelligible figure of speech, is called the husband of the ship; then the compact or agreement between the parties may be enforced by the law of the state, according to its own mode of administering justice in analogous cases. It is only when the enjoyment of the property has not been thus settled by the parties that it becomes necessary to inquire what mode the law of the country has prescribed for the regulation of it. But while it authorizes the majority in value to employ the ship upon any probable design, it takes care to secure the interest of the dissentient minority from being lost in an employment they disapprove. For this purpose it has been the practice

<sup>1</sup> *Parker v. Parker*, 3 Bos. and Pal. 288. *Chapman v. Koops*, *Ibid.* 269.

<sup>2</sup> *Beawes's Lex Mercatoria*, 53. *Molloy de Jure Maritimo*, 310.



of the court of admiralty, from very remote times, to take a stipulation from those who desire to send the ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship within a limited time, or to pay them the value of their shares. When this is done, the dissentient part-owners bear no proportion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking, but the ship sails wholly at the charge and risk, and for the profit, of the others. This security may be taken upon a warrant obtained by the minority to arrest the ship; and it is incumbent upon the minority to have recourse to such proceedings, as the best means of protecting their interest; or, if they forbear to do so, they should at all events expressly notify their dissent to the others, and if possible to the merchants also who freight the ship; for the general rule of law is, that where one tenant in common does not destroy the common property, but only takes it out of the possession of another, and carries it away, no action lies against him; but if he destroys the common property, he is liable to be sued by his companion. And it has also been decided in equity, that one part-owner cannot have redress against another for the loss of a ship sent to sea without his assent<sup>1</sup>.

But if a part-owner expressly notify his dissent, the court of chancery will not compel him to contribute to a loss<sup>2</sup>.

If the minority happen to have the possession, and refuse to employ the ship, the majority also may, by a similar warrant, obtain possession of it, and send it to sea upon giving such security<sup>3</sup>.

And whatever doubts may have been entertained, whether

<sup>1</sup> Abbot's Law of Merchant Ships and Seamen, part I. c. 3. s. 4.

<sup>2</sup> Horn v. Gilpin, Ambl. 255.

<sup>3</sup> Ouston v. Hebden, 1 Wils. 101.

this practice of the court of admiralty was an unfounded assumption of jurisdiction in a matter not within its cognizance, several late decisions have recognised and confirmed it, both as to taking such security, and enforcing the performance of the stipulation upon the loss of a ship<sup>1</sup>. In the case of *Ouston v. Hebden* above cited, lord chief justice Lee said, I have no doubt but the admiralty has a power in this case to compel a security, and this jurisdiction has been allowed to that court for the public good. Indeed, the admiralty has no jurisdiction to compel a sale; and if they should do that, you might have a prohibition after sentence; or we may grant a prohibition against selling, or compelling the party to sell, or to buy the shares of others.

But though the part-owners of a ship are tenants in common with each other of their respective shares; yet if, upon entering into partnership, a ship is brought in as part of the stock in trade, or is after purchased out of the partnership funds, it is necessary there should be a new register in the names of all the partners, otherwise the ship will be considered as the separate property of that one whose name is exclusively on the register<sup>2</sup>.

As to the rights which partners acquire between themselves, it is to be observed, that each partner is not only entitled to his proportion of the partnership estate according to express agreement or what he originally contributed, but he has a lien upon it for any sums of money advanced by him to, or owing to him from, the partnership. And this extends even to property in ships; for in the case of *Doddington v. Hallet*, lord chancellor Hardwicke held, that part-owners have a specific lien on the shares of each other for what they have paid, or are liable to pay, for building and equipping the ship<sup>3</sup>.

<sup>1</sup> 1 *Ld. Raym.* 223, 235. 6 *Mod.* 162. 2 *Ld. Raym.* 1285. 2 *Str.* 890.

<sup>2</sup> *Curtis v. Perry*, 6 *Ves. Jun.* 739. <sup>3</sup> 1 *Ves.* 497.

If one partner pays a debt arising out of a legal contract, for which the partnership was liable, he has an action against the others for a contribution. But if partners should be engaged in any thing *malum in se*, one of them cannot acquire a right of action by paying a sum of money which they had jointly promised to a third person in the course of their immoral transactions. Although these two points have always been considered perfectly clear, considerable uncertainty seems for some time to have prevailed in cases where the debt arose out of a transaction being not *malum in se*, but only *malum prohibitum*. In *Faikney v. Reynous*, it was held, that a bond to reimburse a person who had compounded the difference of stocks, half of what he had paid for himself and a person jointly concerned in the contracts compounded, is not void<sup>1</sup>. For though the statute 7 Geo. II. c. 8. s. 5., prohibits the compounding or making up differences for stocks or other public securities, without specially executing the contract, and actually delivering the stock; yet it does not prohibit the recovery of money paid by one of two partners on account of the other, for which a bond had been given to secure the re-payment.

A distinction, however, has been taken between a debt arising out of a prohibited transaction paid by one partner, with or without the consent of the other. And therefore when the contract is not morally bad, its illegality arising only from its being prohibited by a positive statute, it has been held, that a debt paid by one partner *with the consent and direction* of the other who has jointly contracted, is recoverable in an action for money paid to the other's use. Accordingly, two persons having jointly engaged in a stock-jobbing transaction, and incurred losses, one of them having repaid the broker, employed the whole differences with the privity and consent of the other, was, notwithstanding

<sup>1</sup> Eur. 2069.

the statute 7 Geo. II., allowed to recover a moiety from that other<sup>1</sup>.

But the authority of these two cases has been in some measure shaken by subsequent decisions. For it has been determined that no implied promise can arise directly out of an illegal proceeding, so as to be the foundation of an action, whatever the law may be, where the parties are a step removed from the illegal transaction itself, or one acts by the direction of the other. In *Mitchel and others v. Cockburne*<sup>2</sup>, it was held, that if A and B are engaged in an illegal partnership for the insurance of ships, and A pays the whole of the losses incurred, he cannot maintain an action against B to recover a share of the money that has been so paid. And this decision has been fully confirmed in the case of *Aubert v. Maize*<sup>3</sup>; in which an arbitrator having awarded a sum to be paid by one partner to another, on account of money paid by the latter for losses incurred by them on partnership insurances, that part of the award was set aside.

And of such contracts, which are not immoral in themselves, but are prohibited by statute, a specific execution will not be decreed in equity<sup>4</sup>.

### 3. *Of the Liabilities of Partners with reference to third Persons.*

The transactions of partners, in which they all severally and respectively join, differ in nothing as to legal consequences from transactions in which they are concerned individually; for although the general rule of law is, that no one is liable upon any contract, except such as are privy to it, the liability of partners under contract is commensurate and co-extensive with their rights, and arises from their

<sup>1</sup> *Petrie v. Hannay*, 3 T. R. 418.

<sup>2</sup> 2 Hen. Bl. 379.

<sup>3</sup> 2 Bos. and Pul. 371.

<sup>4</sup> *Knowles v. Houghton*, 11 Ves. Jun. 168.

being considered as virtually present at and sanctioning the proceedings they singly enter into in the course of trade<sup>1</sup>. This responsibility of partners for the acts of each other in the course of trade cannot be limited by any agreement, covenants, or provisos, in the articles by which the partnerships are constituted; it is not merely the sum which they bring into the partnership fund that is risked, but they are answerable to the last shilling of their fortunes<sup>2</sup>.

But though the act of one partner binds the others, yet if they can show a disclaimer, they will be relieved from such responsibility. And it should seem that even during the subsistence of the partnership, and in the established course of trade, one partner may, to a certain degree, limit his responsibility, by giving distinct notice to those with whom his copartners are about to contract, of his dissent to such contract<sup>3</sup>.

When a dormant partner is discovered, he is equally liable as if his name had appeared in the firm; and it will be no security to him that he stipulated that his copartner should carry on the trade at his own separate risk, and that *he* should not be answerable for any of the other's debts and engagements<sup>4</sup>.

This appears from the case of *Stracey, Ross, and others v. Deey*, London Sittings after Mich. 1789. The plaintiffs jointly carried on trade as grocers, but Ross was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, Ross was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy broker, and being indebted for grocery (as he conceived) to Ross, he effected insurances and paid premiums on account of Ross solely, to the amount of his

<sup>1</sup> 1 Salk. 292.<sup>2</sup> 5 T. R. 601.<sup>3</sup> Watson on Partnership, 194.<sup>4</sup> *Hubert v. Nelson*, Davies, B. L. p. 8.



debt, under the idea that one demand might be set off against the other. Ross's affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refused by him on the ground of his having been deceived by the other partners keeping back, and holding out Ross as the only person concerned in the trade. Lord Kenyon, C. J. was of opinion, that as the defendant had a good defence by way of set off, as against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with ; they could not now pull off the mask and claim payments of debts supposed to be due to Ross alone, without allowing the defendant the same advantages and equities in his defence that he would have had in actions brought by Ross.

Neither can they excuse themselves from the liability of a debt fraudulently contracted by their copartners in the course of business, and to which they were not privy ; for by the formation of the partnership each partner has impliedly undertaken to be responsible for what his copartners shall respectively do within the compass of the partnership concerns<sup>1</sup>.

But unless the debt relates to, and has been contracted in the course of the partnership concerns, no joint liability arises, but that partner only will be bound who contracts it. It is only to act in the course of their particular trade, or line of business, that an authority is delegated by partners to each other ; and it is only in such transactions that strangers have a right to go upon the credit of the partnership concerns<sup>2</sup>.

Still less can debts contracted by one partner before the commencement of the partnership constitute a joint demand upon the firm, unless there were an express agreement to be-

<sup>1</sup> Willet v. Chambers, Cowp. 814.

<sup>2</sup> Vin. Abr. v. 16, p. 242.

come responsible for such debts, and then perhaps equity would enforce the payment of them <sup>1</sup>.

Although slight circumstances might be sufficient to induce courts of equity to render a person liable who was not a partner at the time of the original transaction, but had afterwards acquired all the benefit of a partner in such transaction; yet if it clearly appears that no partnership actually existed at the time the contract was entered into, no subsequent act or acknowledgement will create the responsibility arising from partnership <sup>2</sup>.

The power of one partner to bind his copartners in drawing bills of exchange, indorsing such as are payable to the firm, and making and indorsing promissory notes, has never been doubted, if such bills, &c. concern the joint trade <sup>3</sup>. But it is otherwise if they concern the acceptor only in a distinct interest and respect, and the holder of the bill, at the time he became so, was aware of that fact <sup>4</sup>.

And in *Sheriff v. Wilks* <sup>5</sup> it was held that two of three partners who had contracted a debt, prior to the admission of the third partner into the firm, cannot bind him without his assent, by accepting a bill drawn by the creditor upon the firm in their joint names.

When a partner for his own accommodation pledges the partnership property, if the party advancing the money can be considered as being advertised that it was not intended to be a partnership proceeding, but for the separate account of the single partner alone, *prima facie* the partnership is not liable; unless a previous authority or subsequent approbation is shown <sup>6</sup>.

<sup>1</sup> *Ex parte Peele*, 6 Ves. Jun. 602.

<sup>2</sup> *Saville v. Robertson and Hutchinson*, 4 T. R. 720.

<sup>3</sup> *Pinkney v. Hall*, 1 Salk. 126.

<sup>4</sup> *Arden v. Sharpe and another*, 2 Esp. N. P. C. 523.

<sup>5</sup> 1 East's Rep. 43.

<sup>6</sup> *Ex parte Benbonus*, 8 Ves. Jun. 540.

So, if a creditor of one of several partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it was without the consent of the other partner, it is fraudulent and void; but if taken bona fide without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security will prevent the holder from recovering against all the partners <sup>1</sup>.

But the power of one partner to bind the firm by a negotiable instrument ceases with the existence of the partnership. And therefore when the partnership is dissolved, a power to receive and pay all debts due to and from the partnership will not authorize one of the late partners to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution <sup>2</sup>.

And in *Abel v. Sutton* <sup>3</sup> it was determined, that after the dissolution of a partnership, one of the persons who composed the firm cannot put the partnership name to a negotiable security so as to charge the others, even though it existed prior to the dissolution of the partnership, or were for the purpose of liquidating the partnership debts; notwithstanding such partner may have had authority to settle the partnership affairs: to render such security negotiable all the partners must join.

We have seen that one partner cannot by deed bring any fresh burthen upon his copartner; he can, however, bar him of a right which they possess jointly. For where there is a promise to several jointly, or where there are several joint obligees or covenantees, a release by one binds all. In cases, however, of gross collusion with creditors, relief would probably be granted in a court of equity <sup>4</sup>.

<sup>1</sup> *Swan v. Steel*, 7 East's Rep. 210.

<sup>2</sup> *Kilgour v. Finlyson*, 1 Hen. Bl. 155.      , 33 Esp. N. P. C. 103.

<sup>4</sup> *Tit. Release*, Com. Dig. and Bac. Abr.

But it will always be considered in what right a release is given by a joint obligee. If he releases all actions in a representative capacity, a joint bond in his own right is not discharged, and so vice versâ <sup>1</sup>.

To compensate, however, for any hardship which may arise from the operation of a release by one of several partners, the law considers a release to one as enuring to the benefit of all <sup>2</sup>. If two or more are jointly and severally bound in a bond, a release to one discharges the other; and in such case the joint remedy being gone, the several is so likewise. Even if the release were to one, proviso that the other shall not take advantage of it, the proviso would be void and the release would discharge both <sup>3</sup>.

A release will have operation upon a debt due from a partnership by simple contract as well as by specialty. Where a creditor receives only part of his demand from one partner upon a bill of exchange or for goods sold, he may come upon the others for the residue; but if he seals a release to one, whatever sum may still be due to him, he is barred as against each and all of them: Though the debt may not be extinguished, he has for ever parted with his remedy <sup>4</sup>.

With regard to the liability of part-owners for the repairs of a ship and other necessities for the employment of it, one part-owner may in general, by ordering these things on credit, render his companions liable to be sued for the price of them <sup>5</sup>. Yet, if the person who gives the credit does not at the time know that there are other part-owners, he may sue him alone from whom he receives the orders <sup>6</sup>. But one part-owner cannot, by ordering an insurance of the ship without authority from another, charge

<sup>1</sup> Stokes v. Stokes, Vent. 35. 2 Keb. 530.

<sup>2</sup> Co. Lit. 232.

<sup>3</sup> Lit. Rep. 190.

<sup>4</sup> Watson on Partnership, 227.

<sup>5</sup> Wright v. Hunter, 1 East's Rep. 20.

<sup>6</sup> Doo v. Chippenden, at Westm. Sitt. H. T. 1790.

the other with any part of the premium, unless the other afterwards assent to the insurance <sup>1</sup>.

It is a general rule, that the owners are bound by every lawful contract made by the master of the ship relative to the usual employment of such ship <sup>2</sup>. And to constitute such a contract for the owners and on their behalf, the course of the usual employment of the ship is evidence of authority given by the owners to the master. But one part-owner, who dissents from a particular voyage in the manner mentioned at page 360, is not bound, because he does not employ the ship on that voyage, nor derive any profit from it <sup>3</sup>.

So if the master make a particular engagement or warranty relating to the conveyance of merchandise according to the usual employment of the ship, the owners will be bound by such engagement or warranty, although made without their knowledge, and must answer for a breach of it <sup>4</sup>.

As to the extent of the responsibility of part-owners, much difference has prevailed among mercantile nations. In England, formerly, part-owners were answerable to the merchant for the loss or damage of his goods up to the full extent of the amount of such loss or damage. But this proving a great discouragement to trade, it was enacted by the statute 7 Geo. II. c. 18. that no owner or owners of any ship or vessel, shall be liable for any goods or merchandise of any kind shipped on board any vessel, or for any act, damage, or forfeiture done, occasioned or incurred by the master or mariners, without the privity

<sup>1</sup> Ogle and another v. Wrangham, et al. Guildhall Sitt. II. T. 1793.

<sup>2</sup> Molloy de Jure Maritimo, lib. 2. c. 2. s. 14. 8 T. R. 531. 3 Lev. 258. 3 Mod. 321. 1 Show. 29, 101.

<sup>3</sup> Boston v. Sanford, Carth. 58.

<sup>4</sup> Ringuist v. Ditchell, Guildhall Sitt. after Mich. Term, 40 III.



and knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight, due or to grow due for and during the voyage wherein such embezzlement, &c. shall be committed, &c. And by section 2. where the ship or vessel, appurtenances, and freight are not sufficient to make full compensation to all the freighters or proprietors, they shall receive their satisfaction thereout in average, in proportion to their respective losses or damages; and in every such case, it may be lawful for such freighters or proprietors, or for the owners, or any of them, on behalf of himself, and all the rest, to exhibit a bill in any court of equity for the discovery of the total amount of such losses or damages, and also of the value of the ship or vessel, and for an equal distribution and payment thereof amongst such freighters or proprietors, in proportion to their respective losses or damages, according to the rules of equity. Provided (sect. 3.) that the plaintiff or plaintiffs shall annex an affidavit to such bill or bills, that he or they do not collude with any of the defendants thereto; and shall offer to pay the value of such ship or vessel, appurtenances and freight, as such court shall direct. Provided also (sect. 3.) that nothing in the present act shall extend, or be construed to extend to take away any remedy which any person or persons had, before the making of this act, against the master and mariners respectively, in respect of any fraud, abuse, or malversation.

By the 26th Geo. III. c. 86. s. 1. the same limits to the responsibility of the owners in the several cases mentioned in the preceding statute were fixed, and also in the case of robbery, "although the master or mariner shall not be in any wise concerned in, or privy to, such robbery, embezzlement, secreting, or making away with." This statute also contains

contains the same provisions as the preceding act, for remedy against the master and mariners, and has entirely taken away the responsibility of the owners in the case of loss or damage by fire.

#### 4. *Of the Liabilities of Partners for the Torts or Wrongs committed by a Partner.*

Though partners are in general bound by the contracts, they are not answerable for the wrongs of each other. If they all join in one trespass or tort, of course they all may be sued, and compelled to make compensation for the injury they have committed. But this action arises from their personal misconduct, and not from the relation of partnership which subsists between them. With regard to matters quite unconnected with the partnership, trade, or business, there can be no question; and, in general, acts or omissions in the course of the partnership, trade, or business, in violation of law, will only implicate those who are guilty of them. If one of two bankers in partnership should commit usury in discounting bills; if one of two attorneys in partnership should practise without a certificate; if one of two surgeons in partnership should wantonly ill-treat a patient, the innocent partners certainly could not be liable to an action for penalties or damages<sup>1</sup>.

However, this rule admits of exceptions. Partners, like individuals, are responsible for the negligence of their servants upon the maxim of *qui facit per alium facit per se*; and if one of the partners acts, he is considered in this instance as the servant of the rest. In these cases the tort is looked upon as the joint and several tort of all the partners; so that they may either be proceeded against in a body, or

<sup>1</sup> Watson's Law of Partnership, 235.

one may be singled out and sued alone for the whole of the damage done. This happens not unusually in actions for driving against carriages, running down ships, &c. <sup>1</sup>

Of the liability of partners as to smuggling, it appears that if one of the several partners engages in transactions of this kind with the consent or privity of the others, he alone is liable to be prosecuted for the penalties imposed by the revenue laws; but that if more than one should be concerned, they are jointly and severally liable, as the whole of the penalties may be recovered from them all together, or from any one of them separately <sup>2</sup>.

Likewise if goods are imported by one partner on the partnership account, without the duties being regularly paid, each of the other partners who were so at the time of the importation, is liable for the whole duties to the crown, although the importation and entry were only in the name of such one partner <sup>3</sup>.

If a contract is entered into by one partner in contravention of the laws of this country, without the privity or personal participation of his copartners; as if goods are packed by him in a particular manner for the purpose of smuggling; neither the person entering into such illicit contract, nor his copartners, can recover on it. And it makes no difference if the party who executed the contract lives abroad, if his copartners reside in England <sup>4</sup>.

Neither can a contract for a marine insurance contrary to the statute 6 Geo. 1. c. 18. be enforced, if the plaintiff did not alone stand the risk insured, but associated one or more in partnership with him in the transaction. And therefore in *Sullivan v. Graves*<sup>5</sup>, the plaintiff was not allowed to recover the moiety of a loss upon a policy paid into the

<sup>1</sup> Watson's Law of Partnership, 235.

<sup>2</sup> Att. Gen. v. Burgess, Bunb. 223. Rex. v. Manning, Com. Rep. 616.

<sup>3</sup> Att. Gen. v. Stannyforth, Bunb. 97.

<sup>4</sup> Biggs v. Lawrence, 3 T. R. 451.

<sup>5</sup> Sitt. after E. T. 1789.

hands of the defendant by a person who had agreed to take half the plaintiff's risk. And although one partner in such illegal insurances has paid the whole of the loss, he will not be allowed to recover any part of the premiums<sup>1</sup>.

But a number of ship-owners may subscribe a joint fund, proportioned to the respective value of their property, and insure each other's ships respectively, if they are liable to losses only in their proportion of the fund so subscribed, and do not undertake collectively for each other<sup>2</sup>.

But where it was stipulated among the members of a similar association, "that in case of the insolvency of any one of the members, or his inability to pay, the proportionable part or share of such member should be made good by the other members of the company, the partners being considered to be jointly responsible, the insurance was held to be void by the statute 6 Geo. I. c. 18<sup>3</sup>.

### 5. *Of the Dissolution of Partnership.*

The modes by which a partnership contract may be dissolved are various. Bankruptcy, death, outlawry<sup>4</sup>, or attainder for treason or felony, will ipso facto produce that effect. It may also be determined by express stipulation, or effluxion of time; by implication, as in case of a particular adventure; or by consent.

<sup>1</sup> Booth v. Hodson, 6 T. R. 405.

<sup>2</sup> Harrison v. Millar, 2 Esp. N. P. C. 513.

<sup>3</sup> Lees v. Smith, 7 T. R. 338.

<sup>4</sup> Upon the outlawry or attainder the share of the outlaw or convict, as also all the partnership effects are forfeited to the crown; for it is unbefitting the dignity of the crown to be joint tenant, or tenant in common, with another person. (2 Bl. Com. 409.)

But upon an extent against one partner, the crown can only take the separate interest of the partner, and that liable to the partnership debts. (The King v. Sanderson, Wightw. Rep. 50.)

*First, By the Act of the Parties.*

Where the partnership is formed for a single dealing or transaction, as soon as that is completed the partnership is at an end of course. But where a general partnership is entered into for an unlimited time, it may be put an end to at any time by either of the partners ; so that he acts bona fide, *Tamdiu societas durat, quamdiu consensus partium integer perseverat*<sup>1</sup>. Therefore, if either of the partners should think proper to relinquish the partnership, he may do so ; provided he does not break off with some sinister view, or does not quit after some particular business is begun, or at an unseasonable time, which might occasion loss and damage to the partnership<sup>2</sup>.

But it almost always happens, that by articles of partnership a precise term is fixed for the duration of the contract. In that case the partnership is regularly dissolved by the effluxion or expiration of that time for which it was originally agreed between the parties to continue their portion, for the purpose of carrying on the joint trade with a view to their mutual benefit. If the business should still be conducted after that period by all the partners, without any new arrangement of the concern, it would probably be held, in analogy to the law of landlord and tenant, that the partnership continued under the conditions and covenants contained in the original articles, with a power to either party to put an end to it at pleasure<sup>3</sup>.

A partnership for a term of years cannot be dissolved by the will of one, or of any number of the partners short of the whole of them ; but of course, if they all agree upon separating, they may do so at any time<sup>4</sup>.

If one partner grossly misconducts himself, and seems dis-

<sup>1</sup> Dig. lib. xvii. tit. 2.

<sup>3</sup> Ibid.

<sup>2</sup> Watson's Law of Partnership, 381.

<sup>4</sup> Ibid.



posed to involve his copartners in ruin, a court of equity will interfere, and dissolve the partnership before it has come to its natural termination.

Where the purposes for which a contract was entered into can be no longer served, the contract may be disannulled. Therefore, it should seem that a partnership may be dissolved by the insanity of any one of the partners, provided the malady be not of a temporary nature, but such as to render him incapable of conducting the business for a length of time, according to the articles of partnership<sup>1</sup>.

A partnership may likewise be dissolved by the award of arbitrators.

It is customary in regular partnerships to insert a clause in the articles, by which the partners covenant to submit to arbitration any matter or thing which may become the subject of controversy or dispute between them. And although in such cases the arbitrators are usually judges of the parties' own choosing, and proceed in a summary way; yet, if duly authorised, their award is considered final, (as well as where a settlement of accounts is referred to their decision<sup>2</sup>) and consequently binding upon the parties, unless there should appear just grounds, either at law, or in equity, to set it aside.

In order to empower the arbitrators to proceed to the dissolution of a partnership, it is not necessary for the parties submitting to arbitration, to authorise the arbitrators to dissolve the partnership; for if two partners refer all matters in difference between them, the arbitrators have clearly a right to dissolve the partnership<sup>3</sup>.

Articles of partnership frequently contain a provision for a dissolution, upon notice to be given by any one of the

<sup>1</sup> Sayer v. Bennett, at the Rolls, 1st Dec. 1785.

<sup>2</sup> Routh v. Peach, Anst. Cas. Exch. 519.

<sup>3</sup> Green v. Waring, 1 Bl. R. 475.

partners. In such case the mode of proceeding pointed out must be strictly pursued, and a regard to good faith must govern the conduct of the partner who withdraws, in the same manner as a partner withdrawing from a partnership for an indefinite time<sup>1</sup>.

The effect of marriage of a feme sole partner has never been expressly decided, but it would probably be held to operate as a dissolution of the partnership. However women are not unfrequently entitled to shares in banking-houses and other mercantile concerns, under positive covenants: when this happens, their husbands are entitled to such shares, and become partners in their stead<sup>2</sup>.

A partnership may be dissolved as between the partners themselves, and still subsist as between them and the rest of the world. From this liability of partners to answer for the acts of each other, it is necessary that after the dissolution of their connections, to avoid continuing liable to each other's creditors after they have ceased to have dealing together, to give notice in the London Gazette of the dissolution of the partnership<sup>3</sup>. And even this notice in the Gazette will not be sufficient against persons who were customers of the firm during the existence of the partnership, unless an actual knowledge of the dissolution of the partnership can be brought home to them. Therefore when partners dissolve partnership, they should, besides inserting an advertisement in the Gazette, send notice of the dissolution to all their individual correspondents with whom they had dealings while in partnership<sup>4</sup>.

When a partnership is dissolved, it frequently happens that it is only to make some alteration in the firm, after which the partnership business goes on as before. In these

<sup>1</sup> Watson's Law of Partnership, 384.

<sup>2</sup> Ibid.

<sup>3</sup> Gorham v. Thompson, Peake's N. P. C. 42.

<sup>4</sup> Graham v. Hope, Ibid. 254.

cases the partner coming in or retiring generally pays or receives a sum of money in proportion to his share in the concern. If the business is to be given up, or the partners cannot arrive at any amicable arrangement, then the partnership effects are all to be reduced into money, and the produce, together with the other funds of the house, rateably divided among the partners. But before there is any dividend the partnership debts must be paid; and it is only to his share of the surplus that any partner is entitled. Upon this principle it has been held, that if a partner, when he retires, draws out of the partnership stock all that he had paid in, the house being insolvent at the time, he will be obliged to refund to the creditors of the other partners<sup>1</sup>.

As to the effect of bankruptcy on a partnership contract, see the head Bankruptcy.

*Secondly, By the Death of Partners.*

By the death of one of several copartners, the partnership is dissolved, unless there is an express agreement for the transmission of an interest in the business to the deceased partner's family, or for its continuation by his executors or administrators. But though there should be an express stipulation, that upon the death of one particular partner of two, the business should be carried on by his representatives, such a stipulation will not entitle the representatives of the other partner who dies first, to share in the business<sup>2</sup>.

Upon the death of one partner, his representatives become tenants in common with the survivor of all the partnership effects in possession. For it is a maxim of the *lex mercatoria*, that *jus accrescendi inter mercatores, pro beneficio commercii locum non habet*<sup>3</sup>. But the good will of a trade

<sup>1</sup> *Anderson v. Maltby*, 4 Bro. C. C. 423. See 2 Ves. Jun. 244.

<sup>2</sup> *Pearce v. Chamberlain*, 2 Ves. 33.

<sup>3</sup> 1 Inst. 182.

carried on in partnership survives, and is not to be considered partnership stock to which the representatives of a deceased partner have any right, unless there is an express stipulation in the articles of partnership to that effect<sup>1</sup>. Neither are choses in action considered as partnership stock, of which an executor may compel a division; for the remedy for their recovery rests exclusively in the survivor. But when such choses in action are reduced into possession, the representative of a deceased partner is entitled to a share of them<sup>2</sup>.

After the death of one partner, the survivor must, within a reasonable time, account with the representatives of the deceased; and if he will not come to any settlement with them, the Court of Chancery will grant an injunction to restrain him from disposing of the joint stock and receiving the outstanding debts<sup>3</sup>.

Upon the death of one partner, the survivor is to be sued alone by the partnership creditors, to whom he is responsible for the whole of their debts. But if a separate creditor of the deceased partner will have satisfaction out of the partnership effects in his hands, all the partnership debts must be first paid; and he can never be liable to such separate creditor but in respect of the surplus<sup>4</sup>. An executor of the deceased partner and the survivor cannot be sued jointly; for the rights of the executor and the survivor are of several natures; the first is to be charged *de bonis testatoris*, and the other *de bonis propriis*<sup>5</sup>.

But if the surviving partner is not responsible, the partnership creditors may in equity come upon the assets of the deceased partner which are in the hands of his executor.

<sup>1</sup> *Hammond v. Douglas*, 5 Ves. Jun. 539.

<sup>2</sup> *Martin v. Crompte*, 1 Ld. Raym. 340. 2 Salk. 444. S. C.

<sup>3</sup> *Hartz v. Schrader*, 3 Ves. Jun. 317.

<sup>4</sup> *Croft v. Pyke*, 3 P. Wms. 182.

<sup>5</sup> *Kemp v. Andrews*, Carth. 170. 3 Lev. 290, S. C. 2 Salk. 444.

Such creditors, however, cannot before the final adjustment of the account retain any separate property of the deceased which may come into their possession, but must pay it into court<sup>1</sup>.

And it would seem that it is not here as in bankruptcy, that the joint creditors shall come only on the surplus of the separate estate after the separate creditors are satisfied: for it has been held, that a joint bond shall be considered as several against creditors, and that the obligee must come in as a specialty creditor in the administration of assets<sup>2</sup>.

Although the security for a partnership debt should be in any way altered or exchanged after the death of one partner, yet till the debt be actually satisfied, his estate is liable in equity. Thus, if there be judgement in an action against the surviving partner, the debt, nevertheless, retains its original quality, and the assets of the deceased partner are not discharged<sup>3</sup>.

So, where bankers upon a deposit of money in their hands had given notes bearing interest, and the partnership being dissolved, and one of the partners having soon after died, another partnership had been formed between the survivors and others, who had reissued notes of the former partnership, and paid the interest of the deposit notes for nearly two years; it was held, that upon their failure the assets of the deceased partner were not discharged<sup>4</sup>.

## CHAPTER VIII.

### OF MERCANTILE GUARANTEES.

#### 1. *Of the General Law of Guarantees.*

By the statute of frauds, 29 Car. II. c. 3. s. 4. it is enacted, "That no action shall be brought, whereby to

<sup>1</sup> *Stephenson v. Chiswell*, 3 Ves. Jun. 566.

<sup>2</sup> *Burn v. Burn*, 3 Ves. Jun. 573.

<sup>3</sup> *Jacomb v. Harwood*, 2 Ves. 265.

<sup>4</sup> *Daniel v. Cross*, 3 Ves. Jun. 277.



charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

In the construction of this statute, a distinction has been taken between an original promise and a collateral one.

An absolute and original undertaking is where the guarantor has a community of interest with the person for whom he is security<sup>1</sup>: a collateral undertaking is where the original debtor is solely liable in the first instance, and the surety adds his credit to that of his principal, but conditionally, in case of his default<sup>2</sup>. Consequently, the former is not within the statute; the latter is.

Where a promise is at all doubtful, the court will take into consideration the situation and circumstances of the parties, to enable them to judge whether it was understood at the time of the agreement made, that the promise was to be considered an original or a collateral undertaking<sup>3</sup>.

The distinction between collateral and original promises is well exemplified in the *nisi prius* case of *Watkins v. Perkins*<sup>4</sup> by Lord chief Justice Holt. If, says his Lordship, A. promises B., being a surgeon, that if he will cure D. of a wound, he will see him paid; this is only a promise to pay if D. does not, and therefore it ought to be in writing to be within the statute of frauds. But if A. promises in such a case, that he will be B.'s paymaster, whatever he shall deserve, it is immediately the debt of A., and he is liable without writing. In the case first put, it is clear

<sup>1</sup> *Scholes and another v. Hampson and Merriott*, Lancaster Spring Assizes, Coram Chambre J. reported in *Fell's Mercantile Guaranties*, p. 27.

<sup>2</sup> *Anderson v. Hayman*, 1 Hen. Bl. 120. *Saymond v. Gent*, 1 Rol. Abr. 14. pl. 2. *Bæckmyr v. Darnall*, 1 Salk. 27.

<sup>3</sup> *Keate v. Temple*, 1 Bos. and Pul. 158.

<sup>4</sup> 1 *Ld. Raym.* 224.

that

that B. will have a double remedy ; in the second case, the credit would be considered wholly given to the express promiser. And even, if by subsequent circumstances, D. should render himself liable, such liability not having existed, or come into existence at the time of the promise, would not have any effect in varying the predicament of the first promiser, whose promise would still be good without writing. Again, if A. promise B.<sup>1</sup>, that in consideration of his doing a particular act, C. would pay him such a sum ; or that if C. do not pay him such a sum, he, A. will pay the same ; this is no collateral promise, unless C. was privy to the contract, and recognised himself as a debtor also ; but otherwise A. is the sole debtor, and the statute is out of the case.

A promise in writing of a third person to be answerable for the debt, default, or miscarriage of another, will be valid as well where the promise is made previous to or at the time of the sale of the goods, or other credit given to, or liability incurred by the original debtor or defaulter<sup>2</sup>, as where such debt, default, &c. has been contracted prior to the promise<sup>3</sup>.

But though the statute requires the promise of the guarantor to be in writing, so as to render him liable for the debt or default to which the original debtor or defaulter is already subject, yet, if the guarantee had possession of the property of his debtor, and was induced to part with it on the promise of the guarantor, no note in writing is necessary to bring the guarantor within the statute.

Thus in *Catling v. Aubert*<sup>4</sup>, the plaintiff, a broker, having a lien upon certain policies of insurance in his hands, on account of acceptances he was under for his principal, was applied to by the defendant to give up such policies, in order to enable him to recover against the underwriters ;

<sup>1</sup> Fitzgibbon, 302.

<sup>2</sup> *Matson v. Wharam*, 2 T. R. 80.

<sup>3</sup> *Fish v. Hutchinson*, 2 Wils. 94.

<sup>4</sup> 2 East's Rep. 325.

which

which the plaintiff did upon the defendant's verbal undertaking to pay a certain sum for the debt and costs incurred upon one of those acceptances. This sum not being paid, on an action brought, the case was held not to be within the statute.

## *2. Of the Extent and Construction of Guarantees.*

As to the extent and construction of an engagement to guarantee, it is a general rule that the surety shall not be bound beyond the extent of the express words of the engagement into which he has entered. And, therefore, if a person engages for the due performance of a trust for a specific time, as in the case of the Liverpool Water Works Company<sup>1</sup> for twelve months, and in that of *Lord Arlington v. Merricke* for six months<sup>2</sup>, the responsibility of the surety is restrained to the time specified, and he will not be liable if his principal makes default in the execution of such trust after the time conditioned.

So, even though no specific time is limited, yet if the office executed by the principal is an annual office, and he continues in that office over the year, the security entered into for his faithful discharge of the same during the first year is at an end at the expiration of that year<sup>3</sup>.

But notwithstanding a surety is not to be charged beyond the express words of the bond into which he has entered, yet if he does not limit his responsibility, his undertaking will be construed a continuing or standing guarantee to the specified amount.

Thus where the defendant engaged in writing to guarantee the plaintiff "for any goods he hath or may supply my brother W. P. with to the amount of 100*l*." It appeared that the plaintiff after this guarantee had furnished

<sup>1</sup> 6 East's Rep. 507.

<sup>2</sup> 2 Saund. 403.

<sup>3</sup> *Warden of St. Saviours's Southwark v. Bostock*, 2 New Rep. 175.

goods to the amount of 100*l.*, for which he had been regularly paid; and that the sum now in dispute was for a further supply of goods to W. P. The question was, whether this was a continuing contract for guaranteeing the supply of goods at any time afterwards furnished as long as the parties continued to deal together; or whether it was confined to the first hundred pound's worth of goods furnished. Held that it was a continuing or standing guarantee to the extent of 100*l.* which might at any time become due for goods supplied until the credit was recalled <sup>1</sup>.

And if the surety has been once called upon to pay a sum, and having paid it, does revoke his security, it is not sufficient that he write to the obligee, cautioning him against giving any further credit to the party, for whose payments or integrity, he is security; but he will still remain liable, at least, to the amount of the difference between what he has already paid and the whole sum secured <sup>2</sup>.

Where a party is surety for any particular debt, and after the incurring of that debt, transactions continue between the debtor and creditor for whom he is surety, in the course of which the latter makes payments generally, the creditor may apply such payments in discharge of the subsequent transactions, and still hold the surety liable for the original debt <sup>3</sup>.

Neither will a variation in the terms of the agreement, as where the sum secured was conditioned to be paid at a future day, but part thereof was paid down, and the residue was to be paid at a future day, release the surety from his obligation, unless such variation increases his risk <sup>4</sup>.

<sup>1</sup> *Mason v. Pritchard*, 12 East's Rep. 127. *Merle v. Wells*, 2 Camp. N. P. R. 413.

<sup>2</sup> *Shepherd v. Beecher*, 2 P. Wms. 283.

<sup>3</sup> *Hutchinson v. Bell*, 1 Taunt. Rep. 553.

<sup>4</sup> *Turner v. Phillips*, 1 Rol. Abr. 20. pl. 14.

It remains to consider how the responsibility of a surety is affected by any change in the parties constituting a partnership firm.

Though all transactions in the course of partnership dealings are considered as for the benefit of all the members composing it, yet it has no continuance independent of the particular individuals of whom it is composed: rights are not vested in it, but in them; so that there is no transmission of rights to successions in a mercantile house, and all running agreements with a partnership cease when any change takes place by death, the retiring of one partner, or the admission of another in the set of partners existing at the time when the agreements were concluded or the securities were entered into. And, therefore, it has been decided, that an indemnity bond does not remain in force after a change has taken place in the firm with which it was originally entered into; for from the moment of the admission of the new partner the liability of the surety ceases<sup>1</sup>; unless the undertaking is renewed, or that a condition was inserted in the bond that the obligor should be answerable not only to the present but to all future partners in the house<sup>2</sup>.

Neither will a promise given in writing to three partners to pay for goods to be furnished by them to a third person, extend to goods furnished by two of them after the third had withdrawn from the partnership<sup>3</sup>.

Nor will a bond for payment to three partners, of all sums of money advanced by them to a third person, be binding after the death of one of them, so as to cover subsequent advances made after another partner had been taken into the firm<sup>4</sup>.

<sup>1</sup> *Wright v. Russel*, 2 Bl. Rep. 934. 3 Wils. 532.

<sup>2</sup> Per Lawrence, J. in *Strange v. Lee*, 3 East's Rep. 391.

<sup>3</sup> *Myers v. Edge*, 7 T. R. 254.

<sup>4</sup> *Strange v. Lee*, 3 East's Rep. 391.

But



But where the security is given *to the house*, as a banking house for instance, for the fidelity of a clerk in the shop and counting house, and not to particular persons, no change of partners will discharge the surety from his liability <sup>1</sup>.

So a surety will continue liable on his bond given to trustees of a united company, (e. g. The Globe Insurance Company), although not incorporated by charter, for a breach of faithful service by a clerk committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body <sup>2</sup>.

### 3. *How a Promise of Guarantee may be discharged.*

A promise of guarantee may be vacated by any act of the promisee, which tends to increase the risk of the promiser, or to defeat his remedy. And, therefore, if a guarantee gives time to the principal debtor, without the knowledge or concurrence of the surety <sup>3</sup>, or otherwise changes the nature of the security and the credit, as if a bond is conditioned for the payment of money by instalments at different periods, and the obligee agrees with the principal to take notes at distinct periods different from the dates of

<sup>1</sup> Lucas v. Barclay, 1 T. R. 291. n. (a)

<sup>2</sup> Metcalf Bart: v. Bruin, 12 East's Rep. 400.

<sup>3</sup> Nisbitt v. Smith, cited in 6 Ves. Jun. 209.

the instalments<sup>1</sup>, in both cases the surety will be released from his engagement.

So if a creditor parts with a lien which he may have in his power or possession, as where the principal has left a sufficient fund in his hands, and he, instead of reimbursing himself, pays it back to the principal, the surety will be discharged from his responsibility<sup>2</sup>.

If a creditor once wave his original security, and come to a new agreement to take other security, which turns out to be insufficient, a court of equity will not compel payment from the original surety.

In the case of *Skip v. Hucy and others*<sup>3</sup>, the defendants Hucy, Wilcox, and Edwards, were jointly bound to the plaintiff in a bond for the payment of 2000*l.* which had been advanced to the two first named defendants, who were the principals.

At the instigation of Edwards, Hucy persuaded the plaintiff to give up the bond, and take certain notes in lieu of it; and, at the same time, gave him an agreement, in his own name, and the other two obligors, to make up the deficiency, if any, between the sum lent, and what should be paid on the notes. But it did not appear that Edwards had assented, or had any knowledge of this agreement.

The notes turning out very insufficient for the payment of the debt, the plaintiff applied to be relieved against Edwards, as co-obligor in the bond which had been given. But Lord Hardwicke, Chancellor, was of opinion, that as Edwards had been guilty of no fraud, and the plaintiff had discharged him knowingly, and intentionally, he was not now entitled to any relief against him.

The neglect of obligees in a bond, in not properly ex-

<sup>1</sup> *Rees v. Berrington*, 2 *Ves. Jun.* 542.

<sup>2</sup> *Law v. East India Company*, 4 *Ves. Jun.* 424.

<sup>3</sup> 3 *Atk.* 91.

examining for eight or nine years the accounts of a person in their employment, for whose fidelity they had taken security, is not such a laches as will discharge the surety from his responsibility at law <sup>1</sup>.

But Mr. Fell in his Treatise on Mercantile Guarantees, p. 156, is of opinion, that in a court of equity a surety would be relieved from all demands which had occurred from an embezzlement prior to the time when the defendants might, by proper care, have detected it.

Where a surety covenants with the party to whom he is bound for the fidelity of another, that he shall make up his accounts at stated times with the person for whose fidelity he has given bond, if such party omits so to do, the surety will not be answerable for any embezzlement after the time stated that the accounts should have been investigated <sup>2</sup>.

Though a creditor, by compounding with the principal creditor or taking other security from him, thereby releases the security from his responsibility, the law is not the same if he compounds with, or takes other security from the surety, but the principal, or sureties, will remain liable <sup>3</sup>.

4. *What the Surety may compel the Guarantee to do for his Benefit.*

As to the steps the surety may compel a creditor having a security, to adopt for his benefit, against a bankrupt principal, see title "Bankruptcy."

Where the principal is solvent, it may be laid down as a general rule, that a surety may, by application to the court of Chancery, compel a creditor to bring his action against the principal <sup>4</sup>. How far a surety can compel a

<sup>1</sup> The Trent Navigation Company v. Harley, 10 East's Rep. 34.

<sup>2</sup> Montague v. Tidcombe, 2 Vern. 518.

<sup>3</sup> Ex parte Gifford, 6 Ves. Jun. 734.

<sup>4</sup> Rees v. Berrington, 2 Ves. Jun. 542.

creditor having a security to proceed against the person or estate of the principal debtor, will appear from Lord Eldon's judgement in the case of *Wright v. Simpson*<sup>1</sup>. "As to the case of principal and surety, in general cases, I never understood, said his lordship, that, as between the obligee and the surety, there was an obligation of active diligence against the principal. If the obligee begins to sue the principal, and afterwards gives him time, there, the surety has the benefit of it. But the surety is a guarantee; and it is his business to see, whether the principal pays, and not that of the creditor. The holder of the security, therefore, in general cases, may lay hold of the surety; and, till very lately, even in circumstances where the surety would not have had the same benefit that the creditor would. But in late cases, provided there was no risk, delay, or expense, the surety has a right to call upon the creditor, to do the most he can for his benefit; and the latter cases have gone further. It is now clear, that, if the surety deposits the money, and agrees that the creditor shall be at no expense, he may compel the creditor to prove under a commission of bankruptcy, and give the benefit of an assignment in that way.

But a surety cannot compel a creditor to assign a bond, either upon a tender of payment, or upon actual payment<sup>2</sup>.

#### *5. The Surety's Remedy against his Principal.*

Formerly it was held, that a surety who had paid the debt of his principal, could not maintain an action, unless he had taken a counter security. But by more modern decisions it has been established, that if the surety has been

<sup>1</sup> 6 Ves. Jun. 734.

<sup>2</sup> *Gammon v. Stone*, 1 Ves. 339. *Robinson v. Gee*, 6 Ves. Jun. 734.

damnnified,

damnified, he may maintain an action against his principal, whether he has taken a counter security or not <sup>1</sup>.

But whether a surety who, when called upon for payment, gives, in lieu thereof, a security to the creditor, can recover against the principal as for money paid to his use, before actual payment, does not appear quite clear. In the case of *Barclay v. Gooch* <sup>2</sup>, where the surety had given a promissory note payable with interest, and which the creditor had accepted as payment of the debt of the principal, it was decided, that such an action might be supported. But in the subsequent case of *Taylor v. Higgins* <sup>3</sup>, a bond and warrant of attorney given by the surety to the creditor, and accepted by him as payment and satisfaction, was not held a sufficient payment to entitle the surety to maintain such action.

Mr. Fell, p. 169, in commenting upon these two cases, says, "Certainly it seems impossible that these two decisions can stand together: for a promissory note, till payment, is but a security; and, however it may pass as the current representative of money, that will not bind its legal operation; and, if the giving a security of a higher nature cannot be the ground of an action for money paid, till actual discharge, *à fortiori*, one of a lower nature cannot. Besides, the creditor taking such security from a surety, does not discharge the principal, who might, therefore, have two actions brought against him by two different persons for the same debt.

But if the surety take a counter security, as a bond, he cannot, on his being obliged to pay, proceed against his principal, but must resort to such counter-security <sup>4</sup>.

Where a party has become bound for the debt of an-

<sup>1</sup> *Layr v. Nelson*, 1 Vern. 456. *Toussaint v. Martinnant*, 2 T. R. 100.

<sup>2</sup> 2 Esp. N. P. C. 511. <sup>3</sup> 3 East's Rep. 169.

<sup>4</sup> *Toussaint v. Martinnant*, 2 T. R. 100.



other, and the money is due upon the bond, the court of Chancery will, on application, decree the principal to discharge the debt <sup>1</sup>.

So if the principal absent himself, the surety may, by application to that court, be equitably relieved out of the property of the principal <sup>2</sup>.

And if the principal has given bail in an action of debt with surety, the surety, after payment of the debt, has precisely the same right against the bail as against the principal <sup>3</sup>.

If the principal becomes bankrupt, and at the time the surety has in his possession, or under a control equivalent to possession, property of the principal, as agent, bailee, or otherwise, he has a lien upon it to the amount of the sum for which he was security <sup>4</sup>.

#### 6. *Of Co-sureties.*

Where there are more sureties than one, and one alone is obliged to pay, his co-sureties, or their representatives, must contribute a proportional part of the payment to which they were originally liable <sup>5</sup>.

And where there are more than two sureties, and some of them become insolvent, the party, or parties, paying the insolvents' share, shall, in equity, have equal contribution of such share against such of the other sureties as remain solvent <sup>6</sup>.

Neither is the principle of contribution affected by their being bound by separate instruments; but they will be liable to contribute in proportion to the sums for which they had respectively made themselves liable <sup>7</sup>.

<sup>1</sup> Lord Ranelagh v. Hayes, 1 Vern. 189.

<sup>2</sup> Wright v. Morley, 11 Ves. Jun. 23.

<sup>3</sup> Parsons v. Briddock, 2 Vern. 608.

<sup>4</sup> Drinkwater v. Goodwin, Cowp. 251.

<sup>5</sup> Cowell v. Edwards, 2 Bos. & Pul. 268. Primrose v. Bromley, 1 Atk. 89.

<sup>6</sup> Peter v. Rich, 5 C. 1 Ch. R. 35.

<sup>7</sup> Ware v. Horwood, 14 Ves. Jun. 28.

But where a party is bound as a further security, in case those already given should be insufficient, there he shall not be called upon, by the former sureties, to contribute, for in such case he is not a surety <sup>1</sup>.

## CHAPTER IX.

### OF PRINCIPAL AND AGENT.

#### *Of the Relation of Principal and Agent.*

It is a general rule of law, that where a person has power as owner to do any thing, he may, as incident to his right, authorise another to do it. Hence arises the authority of agents to do acts, and make engagements in the names of their principals. And as the office of an agent is merely ministerial, infants, feme-coverts, persons attainted, outlawed, excommunicated, aliens, and others, though disqualified from acting in their own capacity, so as to bind themselves, may yet act as agents for others <sup>2</sup>.

We shall consider this division of our subject, first, with respect to the appointment and authority of an agent; secondly, the rights and liabilities of principal and agent with reference to each other; and thirdly, the rights and liabilities of principal and agent with reference to third persons.

### SECTION I.

#### OF THE APPOINTMENT AND AUTHORITY OF AN AGENT.

##### *1. Of the Appointment of an Agent.*

The appointment of an agent may be by deed, or by parol. It has been said, that an appointment or authority to do an act for another, or to make engagements in his name, must be by deed <sup>3</sup>; but this is by no means the case <sup>4</sup>, for in

<sup>1</sup> Craythorne v. Swinburne, 14 Ves. Jen. 161.

<sup>2</sup> Co. Lit. 52. a.

<sup>3</sup> Beawes's Lex Merc. pl. 86.

<sup>4</sup> 2 Rol. Abr. 8.

commercial transactions agents are most usually appointed by a letter of orders, or simply by a retainer <sup>1</sup>. An appointment by deed is only necessary where the principal is bound by articles under seal; and then in order to bind the principal by the agent's execution of such deed, the agent must be empowered by an authority of as high a nature <sup>2</sup>. An authority to make or sign a promissory note <sup>3</sup>, or to indorse, draw, or accept a bill of exchange <sup>4</sup>, may be, and indeed most usually is, by a parol. And it is not necessary that the authority of an agent to contract for the sale of goods to the value of ten pounds and upwards, according to the provisions of the seventeenth section of the statute of frauds, should be in writing.

Besides these express modes, *viz.* by deed or by parol, of creating an authority, an authority may, in some cases, be implied or inferred from the conduct of the principal in sanctioning the acts of his agent <sup>5</sup>. It has also been decided, that the subsequent assent or acquiescence will make the act of an agent binding on the principal <sup>6</sup>. And if a principal once adopts the acts of his agent, he cannot afterwards discharge himself from his responsibility <sup>7</sup>. Neither can he adopt one part of the act of his agent and disavow the rest; for an adoption of one part of the transaction will operate as an adoption of the whole act <sup>8</sup>. And a principal will remain liable for the acts of his agent even after the agency has ceased, unless the parties giving the credit have had notice of the determination of such authority, or from length of time and other circumstances ought to have in-

<sup>1</sup> Paley's Law of Principal and Agent, 118.

<sup>2</sup> Harrison v. Jackson, 7 T. R. 209.

<sup>3</sup> Stat. 3 and 4 Anne, c. 9.

<sup>4</sup> Anon. 12 Mod. 564. Harrison v. Jackson, 7 T. R. 209.

<sup>5</sup> Beaves, pl. 86. Barber v. Gingell, 3 Esp. N. P. C. 60.

<sup>6</sup> Ward v. Evans, 2 Lord Raym. 930. Salk. 444. 8. C. Boulton v. Hill-  
lesden, Comb. 450.

<sup>7</sup> Ibid.

<sup>8</sup> Wilson v. Poulter, 2 Str. 859.

ferred that it did not continue<sup>1</sup>. On the dissolution, therefore, of the relation of principal and agent, it is indispensably necessary that express notice thereof should be given to all the principal's correspondents individually: notice in the Gazette will affect a former customer<sup>2</sup>.

*2. Of the Extent of the Authority.*

The extent of an agent's authority is either general or special. A general agent is where a man appoints another to transact all his business of a particular kind, or to do all acts connected with a particular employment. A special agent is where one is constituted for a particular purpose, or is employed about one specific act, or certain specific acts only. By a general authority or delegation the principal is bound by all the acts of his agent, which are not inconsistent with the nature of his employment, and which have been *bonâ fide* entered into with the parties dealing, however disadvantageous the terms of the contract may be to the principal. And therefore, if a factor without fraud or collusion sells for a less price than his commission directs, the sale is nevertheless valid, and may be enforced against his principal<sup>3</sup>. But no acts of a special agent beyond the scope of his authority will bind the principal. Therefore, if a broker is employed to purchase goods of a particular description, and at a specified price, and he does not comply with his instructions, the principal is not bound by his contract<sup>4</sup>; but he is liable himself to fulfil the bargain<sup>5</sup>. Had, however, the contract in this case been entered into by a factor or general broker, the contract would have been enforced against the principal<sup>6</sup>. And such general power

<sup>1</sup> ——— v. Harrison, 12 Mod. 346. Beawes, pl. 231.

<sup>2</sup> Gorham v. Thompson, Peake's N. P. C. 42.

<sup>3</sup> Daniel v. Adams, Ambl. 498.

<sup>4</sup> East India Company v. Henley, 1 Esp. N. P. C. 111.

<sup>5</sup> Per T. Sewell in Daniel v. Adams, Ambl. 498.

<sup>6</sup> East India Company v. Henley, 1 Esp. N. P. C. 111. Petties v. Soame, 13 Vin. Abr. 6.

cannot be limited by any private instructions to the agent, not known at the time to the party dealing.

As the authority of a special or particular agent must be strictly pursued, if there is any restriction annexed to the commission, it is incumbent on the party dealing to observe it, or the principal will be discharged from his liability. Therefore, where a special agent was employed to negotiate a bill of exchange, and expressly directed not to indorse it for his principals, it was held that he could not bind them by indorsing it<sup>1</sup>. Yet where a particular agent was commissioned to get a bill discounted, and no express directions were given him not to indorse it, his principals were held to be bound by his having done so<sup>2</sup>. And though an agent, acting under a limited authority, exceeds the price specified in his instructions, yet if he understood that he had a discretionary power so to do, his principal will be bound by the contract; for the limitation should be express and positive, and not subject to the agent's discretion<sup>3</sup>.

The extent of an agent's authority depends on the usages of trade. In the absence of particular instructions, a general power to sell implies a power to sell in the usual way; and therefore a commission to a factor to sell, entitles him to sell upon credit in those trades where that is the usual mode of dealing<sup>4</sup>; provided that the vendee is not insolvent, or notoriously discredited at the time of sale, and that that circumstance is not known to the factor<sup>5</sup>. But if there is no such usage, and the factor upon the general authority to sell, sells upon trust, the factor is only chargeable; for in that case the factor having gone beyond his authority, there is no contract created between the vendee and the factor's principal, and such sale is a conversion in the factor; and if it be not in

<sup>1</sup> Fenn v. Harrison, 3 T. R. 757.

<sup>2</sup> Ibid. 4 T. R. 177.

<sup>3</sup> Hicks v. Hankin, 4 Esp. N. P. C. 116.

<sup>4</sup> Scott v. Surman, Willes, 406. Houghton v. Matthews, 3 Bos. & Pul. 489.

<sup>5</sup> Sadock v. Burton, Yelv. 202.



market overt, no property is thereby altered, but trover will lie against the vendee : so likewise if it be in market overt, and the vendee knows the factor to sell as factor<sup>1</sup>. And as this authority is referred to universal usage, no such authority will be implied, unless it appears that it was the usual manner of dealing with reference to the thing sold. Therefore, on the transfer of stock, which is usually sold for ready money only, a sale of it upon credit will not bind the principal, unless the broker was specially authorised so to do, although he acted *bonâ fide*, and with a view to the benefit of his principal, and that there was no possibility of making a transfer of the stock in question, until the expiration of the time of credit given<sup>2</sup>.

The employment of a factor or broker being merely to sell, he cannot dispose of them in any other manner. Therefore it has been decided, that if a factor or broker pledge the goods of his principal, the latter may recover the value of them in trover against the pawnee<sup>3</sup>, on tendering to the factor what is due to him, without any tender to the pawnee<sup>4</sup>. And this rule holds equally good where the pawnee is wholly ignorant of the factor's not being the owner<sup>5</sup>. Neither can a factor, by way of pledge, transfer a bill of lading<sup>6</sup>, although by way of sale he may, by indorsement of a bill of lading to a *bonâ fide* assignee, divest the principal's right to stop in transitu<sup>7</sup>. And even though the factor may have a lien upon the goods pledged for his balance due at the time of the pledge, the pawnee cannot retain the goods against the owner; for liens being a personal right, cannot be transferred to the pledgee, so as to give him a title even to the

<sup>1</sup> Per Holt, C. J. Anon. 12 Mod. 514.

<sup>2</sup> Wiltshire v. Sims, 1 Camp. N. P. C. 258.

<sup>3</sup> Paterson v. Tash, 2 Str. 1182.

<sup>4</sup> Daubigny v. Duval, 7 T. R. 606. *McCombie v. Davies*, 6 East, 538.

<sup>5</sup> Newson v. Thornton, 6 East's Rep. 17.

<sup>6</sup> *ibid.*

<sup>7</sup> Wright v. Campbell, Bur. 2051.

amount of the lien<sup>1</sup>. But where the broker does not pledge the goods as his own, but delivers them over to the pledgee as a security, and with a notice of the lien, the pledgee may retain them against the owner for the balance due to the broker<sup>2</sup>. So as the right of property, in bills of exchange, and other negotiable instruments of a like nature, passes by delivery alone, it has been held, that if a banker pledges indorsed bills, which had been deposited with him, for the purpose of being received when due, for his own debt, the owner cannot follow them into the hands of a *bonâ fide* pledgee<sup>3</sup>.

Where several merchants employ the same factor in the same transaction, they must run the joint risk of his actions, although they are strangers to each other. Thus, if four or five merchants remit to one factor distinct parcels of goods, which he disposes of jointly to one person, who pays a moiety down, and contracts for the rest at the end of six months; if the vendee fails before the second payment, the principals must share the loss proportionally among them<sup>4</sup>.

As to an agent's authority to discharge, compound, or release debts: in the case of an agent who has a general authority to receive payments, if he receives them according to the usual course of transacting business, he will not be liable for any loss which his principal may sustain thereby. And therefore, where an agent received a check in payment of a debt, the debtor was held to be discharged, as this is a mode of receiving payment warranted by the usual course of trade<sup>5</sup>. But an agent specially employed to receive money, will be considered to have departed from his authority if he should take a bill in payment<sup>6</sup>. An agent

<sup>1</sup> *Daubigny v. Duval*, 5 T. R. 604.

<sup>2</sup> *McCombie v. Davies*, 7 East's Rep. 5.

<sup>3</sup> *Collins v. Martin*, 1 Bos. & Pul. 649.

<sup>4</sup> *Malyne*, 81. 2 Molloy. 328.

<sup>5</sup> *Thorold v. Smith*, 11 Mod. 88.

<sup>6</sup> *Ward v. Evans*, 2 Lord Raym. 930.

without an express authority cannot compound or release a debt.

### *3. Of the Execution of the Authority.*

As to the execution of a delegated authority, as the confidence is merely personal, the power can be executed by the person only to whom it is given; and therefore a commission to contract will not authorise an agent to depute that power to a clerk or underagent, notwithstanding any usage of trade, unless the principal's assent has been expressly obtained for that purpose<sup>1</sup>. In the execution of a delegated authority, it is also an established rule, that where the power is to be executed by virtue of a deed or power of attorney, the act must be executed in the name of the principal, and not in that of the agent<sup>2</sup>. The form of the words in the execution is not material, for in some cases an informal mode of executing the authority will not vitiate<sup>3</sup>. The safest way, however, is for it to be stated to be done by the agent for, or in behalf of, the principal: thus, A B., (principal) by C. D., (agent<sup>4</sup>.) In the case of an agent's drawing, accepting, or indorsing a bill for his principal, he should either write the name of his principal, or state in writing that he draws as agent: for if he draws in his own name, without stating that he acts as agent, his principal will not be bound, but the agent himself will be personally liable<sup>5</sup>. But an agent effecting a policy of insurance<sup>6</sup>, or contracting on the behalf of government<sup>7</sup>, need not state his authority.

<sup>1</sup> *Coles v. Trecothick*, 9 Ves. Jan. 231.

<sup>2</sup> *Combe's Case*, 9 Co. 76.

<sup>3</sup> *Colès v. Davis*, 1 Camp. N. P. C. 485.

*Mason v. Rumsey*, *Ibid.* 384.

<sup>4</sup> *Per Grose, J.* 2 East's Rep. 144.

<sup>5</sup> *Thomas v. Bishop*, 2 Str. 955.

*Appleton v. Binks*, 5 East's Rep. 148.

<sup>6</sup> *De Vignier v. Sanson*, *Park's Insurance*, 19.

<sup>7</sup> *Mackbeath v. Haldimand*, 1 T. R. 172.

#### 4. *Of the Determination of the Authority.*

The manner in which the power of an agent may be determined is either by fulfilment of the commission the agent was to execute<sup>1</sup>, or by the death of the principal<sup>2</sup>, or by the principal's countermanding the authority which he had given.

The authority of a broker may be countermanded at any time before a memorandum of the contract of sale is written and signed by him pursuant to the statute of frauds, although he has previously entered into a verbal agreement to sell the goods<sup>3</sup>.

All acts *bonâ fide* done by the agent before he knows of the revocation of his authority will bind his principal<sup>4</sup>; and all his transactions with those who have been accustomed to deal with him in that character, will be valid against his principal, until they have notice of the determination of his authority<sup>5</sup>, or until that fact has become notorious.<sup>6</sup>

### SECTION II.

#### OF THE RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT AS BETWEEN EACH OTHER.

*First, The Agent's Rights and Liabilities with Reference to his Principal.*

##### 1. *His Duties.*

It is the duty of an agent intrusted with the disposal and management of his principal's property to use the utmost diligence and care, and possess a competent skill and know-

<sup>1</sup> *Seton v. Slade*, 7 Ves. Jun. 276.

<sup>2</sup> 1 Bac. Abr. tit. Authority, E.

<sup>3</sup> *Farnner v. Robinson*, 2 Camp. N. P. C. 399, n.

<sup>4</sup> *Salte v. Field*, 5 T. R. 215.

<sup>5</sup> *Hazard v. Treadwell*, Str. 506.

<sup>6</sup> 12 Mod. 346.

ledge in the execution of the service he has undertaken<sup>1</sup>; for if in the purchase of goods he give considerably more than they are worth, he will be answerable for the over-value himself<sup>2</sup>. In the absence of particular instructions, he should follow the regular and accustomed course of transacting the business in which he is employed. When the contracts entered into by him in behalf of his principal are concluded, he ought to apprise his principal with all convenient expedition: for any culpable delay in this respect on the part of the agent whereby the principal is damaged, as where the vendee becomes insolvent, the factor will be responsible<sup>3</sup>. If he sells upon credit or takes security, it is incumbent on him in the first case to take care that the security is good, and in the second that the time of credit given is reasonable, and according to the usual course of the trade in which he is employed<sup>4</sup>. If no price is specified in his instructions, he is bound to obtain the real value of the thing sold<sup>5</sup>. If the price is fixed, he cannot sell for less<sup>6</sup>. And it is his duty to keep clear and regular accounts of his transactions on behalf of his principal, and communicate the result thereof at proper opportunities<sup>7</sup>.

Where a factor has been accustomed to effect insurances on behalf of his principal, whether at the time of receiving the order he has effects or not of his principal in his hands, he is bound to comply with the order<sup>8</sup>. And if he neglects to effect an insurance, or does not effect an available one, he is responsible to his principal in the event of loss<sup>9</sup>. But if he exerts all his endeavours to effect an insurance, but does

<sup>1</sup> *Russel v. Palmer*, 2 Wills. 325.

<sup>2</sup> *Rol. Abr.* 125.

<sup>3</sup> *Beawes*, 43, 431.

<sup>4</sup> *Barton v. Saddocks*, Balst. 104.

<sup>5</sup> *Beawes*, 43.

<sup>6</sup> *Bexwell v. Christie*, Cowp. 395.

<sup>7</sup> *Lord Chedworth v. Edwards*, 8 Ves. Jun. 49.

<sup>8</sup> *Smith v. Lascelles*, 2 T. R. 189. <sup>9</sup> *Wallace v. Telfair*, in 2 T. R. 188. n.



not succeed, he will not be liable for any loss that may occur<sup>1</sup>. In an action against an agent for not effecting an insurance, he may justify his default on the ground of the illegality of the intended insurance, fraud, deviation, non-compliance with the warranty, &c.<sup>2</sup>, or of deviation in the voyage<sup>3</sup>.

In the case of a gratuitous or voluntary agent, though he is not like a hired agent chargeable for ignorance in the execution of his duty<sup>4</sup>, or responsible for neglecting to proceed at all in his undertaking<sup>5</sup>, yet he is liable for gross negligence or fraud<sup>6</sup>, or for not exerting that knowledge in the execution of the trust he has undertaken, which from his situation or profession he may be presumed to possess. And therefore if a ship-broker or clerk in the custom house undertakes to enter goods, a wrong entry by them will be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but where the entry is made by a merchant, without any compensation for his trouble, and from an erroneous entry the goods are forfeited, if the merchant has acted *bonâ fide*, and to the best of his knowledge, he will not be chargeable for the loss occasioned thereby to the owner of the goods<sup>7</sup>.

## 2. *His Liabilities.*

In mercantile affairs, when goods have been intrusted to the disposal and management of an agent, the law imposes no higher obligation upon him in regard to their safety and preservation than a prudent man would bestow in the

<sup>1</sup> *Smith v. Cadogan*, 2 T. R. 188. n.

<sup>2</sup> *Webster v. De Tastet*, 7 T. R. 157.

<sup>3</sup> *Delany v. Stoddart*, 1 T. R. 22. Park, 404. n.

<sup>4</sup> *Shiells v. Blackburne*, 1 Hen. Bl. 161.

<sup>5</sup> *I.see v. Gatward*, 5 T. R. 143. *Coggs v. Barnard*, 2 Ld. Raym. 909.

<sup>6</sup> *Wilkinson v. Coverdale*, 1 Esp. N. P. C. 75. *Coggs v. Barnard*, 2 Ld. Raym. 909.

<sup>7</sup> *Shiells v. Blackburne*, 1 Hen. Bl. 162.

care of his own property <sup>1</sup>. Therefore, if any loss arises to the goods of his principal while in his possession, from robbery, fire, lightning, or any other accidental damage not occasioned by his default, or improper delay in the removal of the property, he is not answerable for the consequence <sup>2</sup>. Neither is an agent with unlimited authority answerable for any loss or fraud arising from the conduct of a person to whom he has given credit pursuant to the regular and accustomed course of transacting business. Thus, if a banker who has received bills from his correspondent to procure payment, instead of payment, takes the acceptor's check, which is afterwards dishonoured, as such a practice is according to the usual course of banking business, the banker will be discharged from all responsibility <sup>3</sup>. So if it is the usual way of transacting business to remit money or bills by the post, an agent is released from responsibility for money so remitted, if lost; and a fortiori if remitted in this manner by the express directions of the principal <sup>4</sup>. Neither is an agent liable for a breach of his instructions, where a compliance with them would have been a fraud upon the purchasers; as where an agent had secret instructions not to sell under a limited sum, notwithstanding which he sold for the highest sum offered, though less than the limited price <sup>5</sup>. Nor is an agent liable for the neglect of an act which, when performed, the principal could not have enforced. Thus, if the principal directs his agent to effect an insurance on a subject which cannot legally be insured, he cannot, in case of loss, recover the value thereof against his agent for negligence in not procuring an insurance <sup>6</sup>.

<sup>1</sup> Vere v. Smith, 1 Vent. 121. Coggs v. Barnard, 2 Ld. Raym. 917.

<sup>2</sup> Co. Lit. 88 b. Bro. tit. Account, 10. Caffrey v. Darby, 6 Ves. Jun. 496.

<sup>3</sup> Russel v. Haukey, 6 T. R. 12.

<sup>4</sup> Warwick v. Noakes, Peake's N. P. C. 68.

<sup>5</sup> Bexwell v. Christie, Cowp. 395.

<sup>6</sup> Webster v. De Tastet, 7 T. R. 157.

But if an agent by a disposal or adventure of the principal's property not authorised by the usage of trade, or the terms of his employment, and without the express consent of the principal, occasions any loss to the principal, though intended for his benefit, he is answerable for the consequence to the amount of the damage sustained<sup>1</sup>. But though an agent by an unauthorised disposition of his principal's property, subjects himself to any loss or damage that may be occasioned thereby, yet he may be exempted from his liability by the subsequent conduct of his principal, by which he assented to such disposition. Thus, where an agent puts out his principal's money to interest, the acceptance of interest by the principal, was held to be an affirmation of the transaction, and to have discharged him from all liability on the borrower's becoming insolvent, although the original transaction was executed without the principal's knowledge or authority<sup>2</sup>. If an agent deals or speculates with his principal's effects, whatever profit or advantage he derives from this indirect dealing, is the property of the latter, to whom he is accountable by bill filed in equity, notwithstanding that he bore the risk (if any) of failure<sup>3</sup>. So if an agent purchases goods according to the order of his principal, and appropriates the gain to himself, he is accountable to his employer for the profits, that is, for the surplus gained above the prime cost of the goods, though the principal could not have procured the goods of any other merchant for a less sum than that for which the agent sold the goods<sup>4</sup>. And as the principal is entitled to all the increase made upon his property, if any interest

<sup>1</sup> 2 Molloy, 327. *Lewson v. Kirk*, Cro. Jac. 265.

<sup>2</sup> *Clarke v. Perrie*, Eq. Cas. Abr. 708. *Beaumont v. Boulton*, 11 Ves. Jun. 559.

<sup>3</sup> *East India Company v. Henchman*, 1 Ves. Jun. 289. *Russell v. Palmer*, 2 Wils. 325. *Beawes*, 48.

<sup>4</sup> *Massey v. Davies*, 2 Ves. Jun. 317. *Beawes*, 48.

has been made upon a balance in an agent's hand, the principal is entitled to the benefit of it, unless waved by the express or implied consent of the principal<sup>1</sup>. Where however the agent has, at the principal's desire, kept a balance by him<sup>2</sup>, and it has lain unemployed in his hands<sup>3</sup>, interest has been denied.

If an agent places his principal's money to his own account in the hands of his banker, and without specifying it to be the property of his employer, in case of the failure of the banker, the agent will be liable to make good the loss<sup>4</sup>.

And it is a settled rule, applicable to both sales and purchases, that an agent employed to sell, cannot be the purchaser<sup>5</sup>; nor, if employed to purchase, can he be himself the seller<sup>6</sup>, unless by the express consent of his employer<sup>7</sup>; and that it clearly appears, that he furnished his employer with all the knowledge which he possessed himself<sup>8</sup>.

If a principal directs his agent to pay over his property to a party authorised to receive it, it is incumbent on the agent to examine whether such authority is genuine; for, if it should be forged, the payments made by virtue of it will not be protected<sup>9</sup>.

If a factor makes a false entry at the custom house of goods remitted to him, or lands them without entering, whereby they incur seizure or forfeiture, he is responsible for the damage or injury his principal may sustain. But if the factor makes his entry according to the invoice, or his letters of advice, and it happens that these are erroneous,

<sup>1</sup> *Rogers v. Boehm*, 2 Esp. N. P. C. 704.

<sup>2</sup> *Lord Chedworth v. Edwards*, 8 Ves. Jun. 48.

<sup>3</sup> *Rogers v. Boehm*, 2 Esp. N. P. C. 704.

<sup>4</sup> *Wren v. Kirton*, 11 Ves. Jun. 382.

<sup>5</sup> *Lowther v. Lowther*, 13 Ves. Jun. 103.

<sup>6</sup> *Massey v. Davies*, 2 Ibid. 317.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Wren v. Kirton*, 8 Ibid. 502.

<sup>9</sup> *Foster v. Clements*, 2 Camp. N. P. C. 17.

the factor is discharged from all liability, in case the goods are lost<sup>1</sup>.

And if a factor enters into a charterparty of freightment with a master, he is liable for the freight: but if he lades the goods aboard generally, the merchant and the lading are made liable for the freight, and not the factor<sup>2</sup>.

A factor is not liable to make good a loss arising from a commodity's becoming damaged after the purchase<sup>3</sup>.

If a merchant directs his agent to ship him a sum of money, when exportation is prohibited, and the money is seized in endeavouring to ship it, the merchant must sustain the loss<sup>4</sup>. And if an agent takes in payment money which is afterwards depreciated by edict, or proclamation, he is not liable to make good the loss: but it is otherwise if he takes bad money in payment<sup>5</sup>.

Where an agent delegates the trust he has undertaken to another, he is responsible to his employer for the due execution of it by such sub-agent, and is his surety<sup>6</sup>. But as the trust reposed in an agent is personal, the principal cannot compel such inferior agent to account to him: he is liable only to his immediate employer<sup>7</sup>.

Where an agent is limited by instructions it is incumbent on him to adhere punctually to them<sup>8</sup>; for if, in the execution of a commission to purchase, he deviates from his orders in price, quality, or kind, or if, after they are bought, he sends them to a place different from his directions, the principal is not bound to adopt the contract, and accept the goods; but the factor is responsible for the consequence of his act<sup>9</sup>. And for a breach of duty, not only the agent, but the merchant who knowingly forms an illegal contract

<sup>1</sup> *Levison v. Kirke*, Lane's Rep. 65. Beawes, 47.

<sup>3</sup> *Malync*, 84.

<sup>4</sup> *Ibid.*

<sup>6</sup> *Lord North's Case*, Dyer, 161.

<sup>7</sup> *Cartwright v. Hately*, 1 Ves. Jun. 292.

<sup>9</sup> *Beawes*, 48.

<sup>2</sup> *Beawes*, 48.

<sup>5</sup> *Molloy*, 421.

<sup>8</sup> *Malync*, 151.



with him, is liable to indemnify the principal for any loss or damage he may have sustained <sup>1</sup>. Also, by a neglect of any precaution prescribed by the ordinary course of business, though not expressly included in his instructions, an agent is chargeable <sup>2</sup>. But from the case of *Wilson v. Cornwall* <sup>3</sup>, it seems, that if an agent exceeds the price limited by his instructions, but effects an equal saving in some other respect in the same transaction, the principal is bound to adopt his act. Thus, where a factor commissioned to purchase hemp at a certain price, gave a higher price for the hemp than he was directed by his orders, in order to save in the freight, then low, but which was rising in price much faster than the hemp was falling, the principal was held bound by the factor's contract, as the saving in the freight exceeded the excess of the stipulated price.

An agent is not liable to account with his principal until he has actually received payment from the vendee. Therefore, if an agent receives part only of the value of the goods sold, it has been held that he is not compellable to account to his principal until he has received the final payment; unless he has sold contrary to the usual course of trade, or express instructions, or that the delay has been occasioned by his neglect <sup>4</sup>. And though the agent may have debited himself with the amount in his account with the vendee, the principal cannot sue for it until actual payment <sup>5</sup>.

But an agent acting under a *del credere* commission is answerable for the produce of any contract made by him, whether he has received payment or not <sup>6</sup>.

The commission called *del credere* is where a factor undertakes for an additional premium beyond the usual com-

<sup>1</sup> *East India Company v. Henchman*, 1 Ves. Jun. 289.

<sup>2</sup> 3 Ves. Jun. 365.

<sup>3</sup> 1 Ves. 509.

<sup>4</sup> *Varden v. Parker*, 2 Esp. N. P. C. 710.

<sup>5</sup> *Taylor v. Lendie*, 9 East's Rep. 42.

<sup>6</sup> *Grove v. Dubois*, 1 T. R. 112.

mission, not only to be responsible for the solvency of the purchaser, but also for the absolute payment of the price <sup>1</sup>.

Joint agents, although residing in different places, are liable for each other's contracts as agents, notwithstanding any private agreement between them that each shall be liable for his own acts or losses <sup>2</sup>. And it is no discharge of one of two joint factors, that the business was wholly transacted by the other with the knowledge of the principal <sup>3</sup>.

But a discharge of one joint factor is a release of the other <sup>4</sup>.

### 3. *His Rights.*

Besides their commission, which is either regulated by express contract, or depends on the usage of trade, agents are allowed all disbursements, such as premiums, duties, charges for postage, warehouse room, &c. made by them in the execution of their employment <sup>5</sup>, and according to the regular course of transacting business. And if an agent has been limited by his instructions as to his advances, but exceeds them, his principal will be bound by the contract, if he accepts the goods, or does not on the receipt of them object to receiving them on his own account, or does any other act from which a subsequent acquiescence can be inferred <sup>6</sup>.

So if an agent acting for the advantage of his principal ensures a cargo on account of the lateness of the season, or other good cause, he will be entitled to charge his principal with the premium <sup>7</sup>.

But where an agent is appointed the husband of a ship,

<sup>1</sup> *M'Kenzie v. Scott*, 6 Bro. P. C. 287. *Beawes*, 429.

<sup>2</sup> *Waugh v. Carver*, 2 Hen. Bl. 235.

<sup>3</sup> *Goore v. Daubeny*, 2 Leon. 75.

<sup>4</sup> Bro. tit. Charge, 49.

<sup>5</sup> 1 Rol. Abr. 124.

<sup>6</sup> *Wilson v. Cornwall*, 1 Ves. 510.

<sup>7</sup> *Wolfe v. Horncastle*, 1 Bos. and Pul. 323.

although

although it is usual for the owners to direct him to act discretionally for them all ; yet if he does advance premiums without express directions, he cannot recover repayment thereof, unless the owners subsequently acquiesce in his transactions <sup>1</sup>. Nor will the direction of one part owner be sufficient to charge the rest <sup>2</sup>.

Neither is an agent entitled to an allowance for payments or advances made to his principal, or by his order, after he has knowledge that he has committed an act of bankruptcy. But all payments *bonâ fide* made to or by a principal more than two calendar months before the date of a commission, are protected by virtue of the statute 46 Geo. III. c. 135, provided that at the time of the payment the agent so paying or receiving has no notice that the principal has committed a prior act of bankruptcy, or that he is insolvent, or has stopped payment.

Nor can an agent after parting with the possession of his principal's property recover payments voluntarily made, although intended for the benefit of the principal <sup>3</sup>.

And if on the principal's refusal to ratify a contract entered into by the agent on his authority, the agent, from a misapprehension of his liability, pays the money himself, he cannot recover it from his principal, unless the agent is to be considered in the light of a guarantee for the fulfilment of the contract, or that by the general usage of trade he is to be considered as impliedly pledging his own credit <sup>4</sup>.

Neither commission <sup>5</sup>, nor payments or advances made in behalf of his employer <sup>6</sup>, can be recovered by an agent against his principal, if the transaction out of which the contract arose was of an illegal nature. Nor is an agent, if

<sup>1</sup> French v. Backhouse, 5 Bur. 2727.

<sup>2</sup> *Ibid.*

<sup>3</sup> Edmiston v. Wright, 1 Camp. N. P. C. 88.

<sup>4</sup> Child v. Morley, 8 T. R. 610.

<sup>5</sup> Stackpole v. Earl, 2 Wils. 133.

<sup>6</sup> Steers v. Lashley, 6 T. R. 61. Brown v. Turner, 7 *Ibid.* 631.

appointed his principal's executor, entitled to claim commission upon sums sent by his principal in his lifetime, but not received till after his death <sup>1</sup>. If an agent ought to have kept an account of his dealings with his principal, and has omitted to do so, he is not entitled to commission <sup>2</sup>.

And if the principal is by the agent's conduct prevented from enjoying the benefit of the contract entered into by his agent on his behalf, the agent is neither entitled to commission, nor can he recover the price or duties he may have paid. Thus, where a broker purchased goods on commission at a month's credit, and paid duties for them, and sent them to the place of his employer's abode, consigned to his own order, but on the seller's apprehension of the purchaser's credit, the broker did not deliver the goods until the expiration of the month's credit; it was held that on the purchaser's refusal to receive the goods the broker could neither recover the price, duties, or commission <sup>3</sup>.

With respect to an agent's lien on the property of his principal, it is now a settled rule of law, that an agent, whether home or foreign, has a lien upon all property of his principal in his hands, or upon the proceeds thereof, or securities received in the course of his business, both for incidental charges, and for the general balance due to him <sup>4</sup>; and this not only on the particular goods for which the charges are incurred, but on each portion of goods in his possession <sup>5</sup>.

So a factor who has become surety for his principal, has a lien on the price of the goods sold by him for his prin-

<sup>1</sup> *Hovey v. Blakeman*, 4 Ves. Jun. 596.

<sup>2</sup> *White v. Lady Lincoln*, 8 Ibid. 371.    <sup>3</sup> *Hurst v. Holding*, 3 Taunt. 32.

<sup>4</sup> *Kruger v. Wilcox*, 4 Bur. 2221. *Drinkwater v. Goodwin*, Cowp. 251. *Man. v. Shiftner*, 2 East's Rep. 529. *Kinlock v. Craig*, 3 T. R. 119. *Goding v. London Assurance Company*, 1 Bur. 494. *Hammond v. Barclay*, 2 East's Rep. 227. *Foxcroft v. Devonshire*, 2 Bur. 936.

<sup>5</sup> Ibid.

principal, to the amount of the sum for which he has become surety <sup>1</sup>.

And if an agent has accepted bills for the accommodation of his employer, he may retain money in his hands to discharge them, unless he is indemnified <sup>2</sup>.

Neither is a factor's lien which he may have acquired by the acceptance of bills on the faith of having goods consigned to him, divested by the death of the principal between the consignment and the arrival of the goods.

But to found this lien of the agent on the goods of his principal, it is necessary that they should have actually come into his possession; for, if stopped in transitu by the owner, no such right vests in him <sup>3</sup>. And on this principle it has been held, that where a trader, after a secret act of bankruptcy, consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader; the factor was held answerable for the proceeds of the sale of the goods to the assignees of the trader <sup>4</sup>.

So if goods are sent for the express purpose of paying the principal's acceptances, the factor can have no lien upon them for his general balance <sup>5</sup>.

Neither has an agent a lien on goods consigned to him for debts contracted prior to the commencement of his employment as agent, for liens extend only to demands arising subsequent to the time he begins to be employed in that character <sup>6</sup>.

So if goods come into the possession of a factor, not by the consignment of the owner, but by consignment or de-

<sup>1</sup> Drinkwater v. Goodwin, 1 Cowp. 251.

<sup>2</sup> Madden v. Kempster, 1 Camp. Rep. 12.

<sup>3</sup> T. R. 119.

<sup>4</sup> Copeland v. Stein, 8 T. R. 199.

<sup>5</sup> Kinlock v. Craig,

<sup>6</sup> Per Ashhurst J. in Tooke v. Hollingworth, 5 *Ibid.* 228.

<sup>7</sup> Houghton v. Matthews, 3 Bos. and Pul. 185.



livery of the person to whom he has transferred the property in them, the factor can have no lien upon them for advances made to the owner<sup>1</sup>.

And if a factor comes into possession of goods in consequence of an agreement communicated to him, that they should be sold for the benefit of a creditor, the factor cannot retain them on account of any other claim he may have against the owner of the goods. For the lien which a factor has upon the goods of his principal arises from an agreement which the law implies; but where there is an express stipulation to the contrary, it puts an end to the rule of law<sup>2</sup>.

The right which factors have to retain for a general balance, or for advances made by them, may also be lost by parting with the possession of the goods, either by delivering them up to their employers<sup>3</sup>, or shipping them to their order<sup>4</sup>.

But from the case of *Whitehead v. Vaughan*<sup>5</sup>, it seems that if the goods return into the factor's possession in the course of dealing, the lien will be restored.

And if a factor procures goods on his own credit, and ships them to his principal<sup>6</sup>, or if he ships goods to his own order<sup>7</sup>, he has a sufficient lien upon them, so as to entitle him to stop them in transitu.

Where an agent employs another to execute the commission of his principal, such inferior agent has no lien on the property of the principal, for any claim he may be entitled to against the person immediately employing him, if he was informed of the nature of the transaction<sup>8</sup>. But

<sup>1</sup> *Houghton v. Matthews*, 3 Bos. and Pul. 485.

<sup>2</sup> *Walker v. Birch*, 6 T. R. 258. *Weymouth v. Boyer*, 1 Ves. Jun. 416.

<sup>3</sup> *Kruger v. Wilcox*, 4 Bur. 2221.      <sup>4</sup> *Sweet v. Pym*, 1 East's Rep. 4.

<sup>5</sup> *Cooke's Bank. Laws*, 579.      <sup>6</sup> *Feize v. Wray*, 3 East's Rep. 93.

<sup>7</sup> *Sweet v. Pym*, 1 *Ibid.* 4.

<sup>8</sup> *Maans v. Henderson*, 1 East's Rep. 334.

where the agent was a creditor of the principal and a debtor of the sub-agent, the sub-agent was held entitled to retain the property of the principal which was in his hands until the agent's claim was satisfied <sup>1</sup>.

Where an agent cannot safely deliver up his principal's property to him from a bonâ fide apprehension of conflicting claims, if sued for the same, he should make application to the court of Chancery, or the court in which the action is brought, for leave to pay the money into court <sup>2</sup>.

*Secondly, The Principal's Rights and Liabilities with reference to his Agent.*

From what has been already said it will appear, that if an agent makes a wrongful and unwarrantable disposition of the property of his principal, he is liable to account for the damage sustained. But, in general, the death of an agent puts an end to personal remedies for his misconduct, unless he has been guilty of fraud in selling his principal's goods at a price less than his orders, or under their value; and then his estate will in equity be liable <sup>3</sup>.

So a principal may recover money paid into an agent's hands on an illegal contract; although the principal could not have recovered it from the person by whom it was paid. Thus, a principal was held entitled to recover the amount of the loss received by his broker on an insurance contrary to the provisions of the statute 7 Geo. I. st. 1. c. 21. s. 2. <sup>4</sup> So an agent was held liable to account to his principal for the price of counterfeit coin received by him from the purchaser <sup>5</sup>. The court holding in both cases, that the liability of an agent arises solely from the fact of

<sup>1</sup> *Man. v. Shiffner*, 2 East's Rep. 522.

<sup>2</sup> *Langston v. Boylston*, 2 Ves. Jun. 101. *Edwards v. Minett*, 1 Taunt. 164.

<sup>3</sup> *Lord Hardwicke v. Vernon*, 4 Ves. Jun. 418.

<sup>4</sup> *Tenant v. Elliott*, 1 Bos. and Pul. 3.

<sup>5</sup> *Farmer v. Russel*, Ibid. 296.

having received money for the use of his principal, and that the original transaction forming no part of such an implied contract, when the original transaction is at an end, its illegality will furnish no ground of defence to the agent to resist his principal's claim, if the agent has received no notice from the person by whom the money was paid to retain it <sup>1</sup>.

And as long as money deposited with an agent, for an illegal purpose, remains unemployed, or if the purpose is countermanded by the principal, before application, it is recoverable from the agent <sup>2</sup>. But where an agent has actually applied money to the purpose for which it was deposited with him, it is not recoverable by the principal <sup>3</sup>.

But a principal cannot recover from his agent the profits obtained on illegal stockjobbing transactions <sup>4</sup>. Nor can he recover from him an overcharge in the purchase of shares in a company contrary to the statute 6 Geo. I. c. 18. s. 18.

As an agent stands in the situation of a trustee with his principal, whatever property he has of his principal at the time of his bankruptcy, and can be distinguished from the general mass of his property, does not pass by the assignment, but belongs to his principal <sup>5</sup>, subject to a lien for every thing for which the estate is creditor <sup>6</sup>.

But by the statute 21 Jac. I. c. 19. s. 10. if the agent has, by the permission and consent of the true owner, exercised reputed ownership over goods committed to his management and disposal, such goods shall be liable to the bankrupt's debts.

Whether the agent's possession of the goods of his prin-

<sup>1</sup> *Sullivan v. Greaves*, 6 T. R. 409.

<sup>2</sup> *Ex parte Bulmer*, 13 Ves. Jun. 313.

<sup>3</sup> *Smith v. Bromley*, Doug. 697. n.

<sup>4</sup> *Ex parte Bulmer*, 13 Ves. Jun. 313.

<sup>5</sup> *L'Apostre v. Plaistrier*, 1 P. Wms. 318. *Godfrey v. Furzo*, 3 Ibid. 185. *Mace v. Cadell*, Cowp. 232.

<sup>6</sup> *Zinck v. Walker*, 2 Bl. Rep. 1156.

principal has been such as to hold out a credit to the world, and induce mankind to treat with the agent in the disposition of such goods as if they were his own, may be collected from the decision of Lord Chancellor Cowper in the case of *Copeman v. Gallant*, 7 Vin. Abr. 89. It (said his lordship) a factor continues in long possession, by which the goods are taken as his own, and credit given to him on that account, it would bring the case within the statute; for if possession and disposition be given to a person who becomes a bankrupt, though no intent of fraud appears, yet if it gives a false credit, there is the same inconvenience as if fraud was intended, and it matters not whether it was by fraud, or only by neglect <sup>1</sup>.

And the law is the same whether the agent acts under a *del credere* commission or not <sup>2</sup>.

If the price of goods sent to a factor for sale has been received by him, and can be identified from the general mass of his property, (as if it has been kept in separate bags,) it will not pass by the assignment of the factor's estate in case of his bankruptcy, but will belong to his principal <sup>3</sup>.

And notwithstanding the property of the principal may have been mixed with that of the bankrupt, yet if it has once got out of the general fund again, and can be identified at the time of the bankruptcy, it may be specifically claimed. Thus, if a factor buys other goods for his principal with the proceeds of his principal's goods, the principal is entitled to the goods so purchased in case of the factor's bankruptcy <sup>4</sup>. So where a factor having money of J. S. in his hands, bought South Sea stock as factor for J. S.,

<sup>1</sup> But it seems that this would not be the case where it is notoriously known that the person exercising the reputed ownership acts as agent.

<sup>2</sup> *Paul v. Birch*, 2 Atk. 621. Ex parte Oursell, Ambl. 297.

<sup>3</sup> Per Lord Kenyon, in *Tooke v. Hollingsworth*, 5 T. R. 227.

<sup>4</sup> *Whitecomb v. Jacob*, 1 Salk. 160.

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and took the stock in his own name, but entered it in his account book as bought for J. S., it was held that the stock did not pass by his bankruptcy <sup>1</sup>.

But where money arising from the sale of the principal's goods has been mixed by the factor with his own funds, the principal cannot reclaim it, but must come in rateably with the other creditors under the commission <sup>2</sup>. And the law is the same if the factor negotiates the securities of his principal which may be in his hands <sup>3</sup>, or does not apply money intrusted to him to pay over, but mixes the produce of the securities or the money so intrusted with his own funds <sup>4</sup>.

If a factor sells his principal's goods upon credit <sup>5</sup>, or receives bills or notes for the amount <sup>6</sup>, the principal is entitled to the payment of the price or the bills or notes as the case may be, and not the assignees.

So if bills or notes are deposited with an agent or banker, for any special purpose, as for answering other specific bills; or for being presented for payment, such bills or notes, if they remain in the possession of the agent or banker at the time of his bankruptcy, will not pass by the commissioners' assignment to the assignees, but are recoverable by the owner <sup>7</sup>. And it does not alter the case that the banker has credited his customer, as for cash, for the amount of bills deposited for any specific purpose, charging interest for the time they have to run, if it was his custom so to do, and provided the balance of his cash account, independent of such bills, was in favour of the customer at the time of his bankruptcy <sup>8</sup>.

But unless they are specifically appropriated for some particular purpose, but are paid in from time to time, on a

<sup>1</sup> *Ex parte Chion*, 3 P. Wms. 186. n.

<sup>3</sup> *Ex parte Dumas*, 2 Ves. 585.

<sup>5</sup> *Garratt v. Cullum*, Bul. N. P. 142.

<sup>7</sup> *Ex parte Dumas*, 1 Atk. 232.

<sup>2</sup> *Scott v. Surman*, Willes, 401.

<sup>4</sup> *Cooke's B. L.* 380 to 394.

<sup>6</sup> *Scott v. Surman*, Willes, 400.

<sup>8</sup> *Zinck v. Waller*, 2 Bl. Rep. 1156. *Ex parte Oursell*, Amb. 297. *Hassall v. Smithers*, 12 Ves. Jun. 119.

<sup>8</sup> *Giles v. Ierkins*, 9 East's Rep. 12.



general running account, and as an item in the account, they are not reclaimable by the owner, but will pass under the assignment <sup>1</sup>.

And though negotiable securities deposited for a special purpose in an agent's or banker's hands are reclaimable while in his possession; yet if he has parted with them, they cannot, if they were indorsed, be followed into other hands to which they may have come by the banker's assignment <sup>2</sup>.

If a factor under a *del credere* commission sells his principal's goods as his own, the purchaser may set off any demand he may have on the factor against the demand for the goods made by the principal, if the transaction was *bonâ fide* entered into without any knowledge on the part of the purchaser that the goods were the property of the principal <sup>3</sup>.

So if a factor at the time of the sale agrees to set off for the price of the goods a debt of his own due to the purchaser, the principal cannot recover the value from the purchaser, but must come in rateably with the other creditors under the factor's bankruptcy <sup>4</sup>.

It is to be observed, that in all cases where a principal is entitled to reclaim his property in the event of his factor becoming bankrupt, he can only reclaim such property subject to a lien for every thing for which he is a debtor to the agent's estate <sup>5</sup>.

In the event of an agent's death, the amount of goods sold upon credit, if unpaid at the time of his death, is the property of the principal, but subject to a lien for whatever the principal is indebted to his agent's estate <sup>6</sup>. But

<sup>1</sup> *Bent v. Puller*, 5 T. R. 494. *Ex parte Oursell*, Amb. 297.

<sup>2</sup> *Collins v. Martin*, 1 Bos. and Pul. 648. *Bolton v. Pul*, Ibid. 539.

<sup>3</sup> *George v. Claggett*, 7 T. R. 359. *Ex parte Murray*, Cooke's B. L. 400.

<sup>4</sup> *Scott v. Surman*, Willes, 400.

<sup>5</sup> *Zinck v. Waller*, 2 Bl. Rep. 1156. *Ex parte Dumas*, 2 Ves. 582.

<sup>6</sup> *Burdett v. Willett*, 2 Vern. 638.

money unemployed in an agent's hands at the time of his death, and not kept separate from his own funds, is a debt due from his estate, as to which the principal will be postponed to debtors of a higher class<sup>1</sup>.

If an agent with a limited commission exceeds his authority, either as to price, quality, or kind, his principal is not bound to adopt the contract, or return the goods into his agent's hands, but may dispose of them as agent for the latter<sup>2</sup>. But in so doing, he must, at first, decisively reject the contract; for if he ships the goods on a new risk, with the hopes of deriving a benefit thereby, he cannot return them on the factor's hands, but must account for the whole price<sup>3</sup>.

### SECTION III.

#### OF THE RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT WITH RESPECT TO THIRD PERSONS.

*First, The Principal's Rights and Liabilities with reference to third Persons.*

##### 1. *His Liabilities.*

A PRINCIPAL is not only bound by the contract itself entered into by his authorised agent, but is affected by his representations or admissions, whether true or false, or by his knowledge, from whatever channel it may happen to be known to the agent; for the declarations of an agent are equivalent in effect to those of the principal<sup>4</sup>.

But to produce this effect, the representation or admission of the agent must be made at the time of sale<sup>5</sup>, or in the

<sup>1</sup> *Martin v. Crompe*, 1 Ld. Raym. 310.

<sup>2</sup> *Cornwall v. Wilson*, 1 Ves. 509.

<sup>3</sup> *Kemp v. Prior*, 7 Ves. Jun. 210.

<sup>4</sup> *Maester v. Abraham*, 1 Esp. N. P. C. 275.

<sup>5</sup> *Helyear v. Hawke*, 5 Ibid. 72.

course of the execution of the particular transaction about which he is employed<sup>1</sup>. And in order that the knowledge of a fact in respect to a contract concluded by the interposition of an agent, should affect his principal, the knowledge must have been obtained by the agent in the execution of the identical transaction, and must have taken place between the same parties<sup>2</sup>. Neither will a knowledge of a fact obtained by one who was merely employed to carry proposals from one side to the other, but who was not empowered to treat, operate as a notice to the principal<sup>3</sup>.

In contracts of insurance, the misstatement or suppression of any fact within the knowledge of the agent at the time of effecting the policy, from whatever source such knowledge may be derived, will invalidate the principal's right to the benefit of the insurance in case of loss<sup>4</sup>. Nor will it alter the case that the principal has made a full disclosure of all the facts within his knowledge, with the intention that they should be communicated to the insurers, if the agent has concealed any material part of that intelligence<sup>5</sup>.

A principal is likewise responsible for the negligence, fraud, or tortious acts of his agent while acting within the scope of his employment<sup>6</sup>.

Thus the East India Company were held liable to the owner for the value of a ship and cargo which their agent had purchased for them from the master, but who had no power to sell, notwithstanding the contract was entered into without their privity<sup>7</sup>.

Nor is the principal released from this responsibility

<sup>1</sup> *Peto v. Hague*, 1 Esp. N. P. C. 375.

<sup>2</sup> *Warrick v. Warrick*, 3 Atk. 294. *Worsley v. Earl of Scarborough*, Ibid. 392.

<sup>3</sup> *Shelborne v. Inchiquin*, 1 Bro. C. C. 351.

<sup>4</sup> *Seaman v. Fonnereau*, 2 Str. 1183.

<sup>5</sup> Ibid. *Fitzherbert v. Mather*, 1 T. R. 12.

<sup>6</sup> *Tuberville v. Stampe*, 1 Ld. Raym. 264. *Middleton v. Fowler*, 1 Saik. 282. *Grammar v. Nixon*, 1 Str. 653.

<sup>7</sup> *Ekins v. East India Company*, 1 P. Wms. 395.

where the agent employs another to execute the contract, but he is answerable for the wrongful acts of such inferior or sub-agent <sup>1</sup>.

If a principal employs an agent in the commission of a fraud, he is responsible for the consequences of it. Thus, where a merchant consigned counterfeit jewels to his factor abroad, knowing them to be counterfeit, and the factor procured a person to sell them as real jewels, who was imprisoned by the laws of the country for the deceit, the merchant was held liable to damages for the injury arising from the imprisonment <sup>2</sup>.

Principals are responsible for all contracts entered into with their authorised agents, without any regard to the state of the accounts between them <sup>3</sup>. Therefore a vendee by paying his own broker the price of the goods does not discharge himself from the demand of the vendor; unless, when the goods are sold for a limited credit, the vendor allows the day of payment to pass without making any demand upon the vendee <sup>4</sup>.

And no private agreement between the principal and agent, that the latter only is to be answerable to the seller, will affect the vendor's right of claiming payment from the principal <sup>5</sup>, unless the vendor had notice of such agreement, and in consequence gave credit to the agent individually as the responsible person <sup>6</sup>.

An acknowledgement <sup>7</sup> or promise <sup>8</sup> of an agent who has usually transacted the business in reference to which the acknowledgement or promise was made, will prevent the statute of limitations from operating in favour of his principal.

<sup>1</sup> *Bush v. Steinman*, 1 Bos. and Pnl. 409.

<sup>2</sup> *Southern v. How*, *Bridgman*, 126.

<sup>3</sup> *Waring v. Favenc*, 1 Camp. N. P. C. 85.

<sup>4</sup> *Kymer v. Suwercropp*, *Ibid.* 109.

<sup>5</sup> *Rich v. Coe*, *Cowp.* 636.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Burt v. Palmer*, 5 Esp. N. P. C. 145.

<sup>8</sup> *Palethorp v. Furnish*, 2 *Ibid.* 211.

The principal is bound by the delivery of goods to his accredited agent in the course of his employment, and is liable to account to the vendor of the goods for their value, notwithstanding he never received them from the agent<sup>1</sup>.

So if a purchaser of goods has paid the amount of the purchase to the agent, and the agent has not paid it over to his principal, the principal cannot recover it again from the purchaser<sup>2</sup>.

A receipt given by a creditor to an agent does not necessarily of itself operate as a discharge to the principal<sup>3</sup>, unless the principal has allowed it in his agent's account, or that he has given him further credit on the faith of it<sup>4</sup>.

## 2. *His Rights.*

As a principal is bound by the contracts and acts of his agent while acting within the scope of his authority, it follows as a consequence, that those who deal with an agent authorised to bind his employer by his contracts, are liable to the principal for the completion of such contracts, unless the agent has acted with fraud, misrepresentation, or concealment in the execution<sup>5</sup>. And this liability of the buyer to the principal is not altered by the circumstance of the agent's acting under a *del credere* commission<sup>6</sup>.

If an agent sells his principal's goods on credit, where his instructions or the usual course of trade authorise him to sell for ready money only<sup>7</sup>; or if he pledges or exchanges goods which he was employed only to sell<sup>8</sup>; as no

<sup>1</sup> *Mead v. Hamond*, 1 Str. 505.

<sup>2</sup> *Corey v. Webster*, 1 Ibid. 480.

<sup>3</sup> *Wyatt v. Marquis of Hertford*, 3 East's Rep. 147.

<sup>4</sup> Ibid.

<sup>5</sup> *Peto v. Hague*, 5 Esp. N. P. C. 134.

<sup>6</sup> *Grove v. Dubois*, 1 T. R. 113.

<sup>7</sup> *Hicks v. Hankin*, 4 Esp. N. P. C. 116.

<sup>8</sup> *Newson v. Thornton*, 6 East's Rep. 17.



contract is thereby created between the principal and the vendee, the former is not bound by his agent's act, but may reclaim his goods or recover their value from the latter.

The principal may recover back money paid by his agent, if the party with whom the contract is made fails to fulfil the bargain <sup>1</sup>, or if paid by mistake <sup>2</sup>, or illegally extorted from his agent <sup>3</sup>, or if fraudulently applied by the agent to an illegal purpose, provided its identity can be traced and ascertained <sup>4</sup>.

If an agent enters into contracts in behalf of his principal without his privity or directions, it is optional to the principal either to reject or affirm them. But he cannot adopt the agency in one part which is beneficial, and reject the remainder: he must either affirm or reject altogether <sup>5</sup>.

As to payments and receipts by agents, if the money is due on a written security, it is incumbent upon the debtor, if the payment is demanded by an agent, to see that he is in possession of the security, or of a special authority from the obligee, otherwise he is not discharged from his responsibility to the obligee, but must pay it over again to him <sup>6</sup>. Nor is he discharged by a payment to an agent, though the money may have been borrowed through his medium, or that he is usually employed to receive his principal's money, if the security is not in the agent's possession at the time of payment <sup>7</sup>. But where a debtor has made a payment to an agent in possession of the security under which the payment is claimed, he is not liable to repay it to the principal although he never received it from his agent by reason of his bankruptcy <sup>8</sup>.

<sup>1</sup> *Duke of Norfolk v. Wortley*, 1 Camp. N. P. C. 337.

<sup>2</sup> *Archer v. Bank of England*, Doug. 419.

<sup>3</sup> *Stevenson v. Mortimer*, Cowp. 805.

<sup>4</sup> *Clarke v. Shee*, Cowp. 197.

<sup>5</sup> *Wilson v. Poulter*, 2 Str. 859.

<sup>6</sup> *Duchess of Cleveland v. Dashwood*, 2 Eq. Ca. Abr. 709.

<sup>7</sup> *Ibid.* <sup>8</sup> *Abington v. Orme*, 1 *Ibid.* 145.

But as to payment of debts not arising upon written securities, payment to an agent properly authorised, and known to act as the representative of his principal, is equivalent to payment to the principal, and will discharge the debtor, if the usual mode of transacting business warrants such payments, and the debtor has received no notice from the principal to withhold payment from the agent <sup>1</sup>.

And even after notice, and notwithstanding the purchaser was aware of the representative character of the agent, he may safely pay the price to him, if the principal on the general balance of the account is indebted to the factor <sup>2</sup>.

So if a purchaser deals with a factor or broker wholly in his own name, and not apprized at the time that he was dealing with him in a representative capacity, or that there was any other party to the contract, he is discharged by payment to him <sup>3</sup>; and if payment has not already been made, he may, in an action brought against him for the value of the goods, set off any claim he may have against the factor in answer to the demand of the principal <sup>4</sup>; provided there was no collusion between him and the factor, as that the insolvency of the factor was known at the time of the contract to the purchaser <sup>5</sup>; or that, before the contract was completed by the delivery of all the goods, he was not apprized that the contract was made in behalf of the principal <sup>6</sup>.

Neither will the circumstance of its being known to the purchaser, that the seller was a general factor, deprive him of the benefit of set-off in an action brought against him by the owner of the goods, unless he had express knowledge

<sup>1</sup> 7 Ves. Jun. 470. *Drinkwater v. Goodwin*, Cowp. 256. *Scrimshire v. Alderton*, 2 Str. 1182.

<sup>2</sup> *Drinkwater v. Goodwin*, Cowp. 251.

<sup>3</sup> *Coates v. Lewes*, 1 Camp. N. P. C. 444.

<sup>4</sup> *George v. Clagget*, 7 T. R. 359. <sup>5</sup> *Estcott v. Milward*, 7 T. R. 361. a.

<sup>6</sup> *Moore v. Clementson*, 2 Camp. N. P. C. 24.

that he acted as agent in that particular transaction which is the ground of the action <sup>1</sup>.

Nor can a repayment of money paid to a factor acting under a *del credere* commission, be enforced by the principal against the purchaser <sup>2</sup>.

We have seen that the receipt of an authorised agent is equivalent to that of the principal. But if an agent gives a receipt without having received the money, the principal is not thereby excluded from maintaining his claim against the vendee <sup>3</sup>.

So a demand by a known agent, or one sufficiently authorised to receive the thing demanded, is equivalent to that of the principal <sup>4</sup>. But to give this effect to the demand of an agent, he must produce his authority if required <sup>5</sup>. This appears from what was said by Lord Kenyon in the case of *Solomons v. Dawes* <sup>6</sup>. If (said his lordship) the demand of the things for which the action is brought, is not made by the plaintiff himself, who is the owner, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know to whom they belong, and therefore keeps them till that is ascertained; or that the person who applies is not properly empowered to receive them; or until he is satisfied by what authority he applies; that shall not be deemed such a refusal as shall be evidence of a conversion.

*Secondly, The Agent's Rights and Liabilities with reference to Third Persons.*

*1. His Rights.*

It is an acknowledged principle of law, that on all contracts entered into by an agent, whether on his own credit,

<sup>1</sup> *Moore v. Clementson*, 2 Camp. N. P. C. 24.

<sup>2</sup> *Scrimshire v. Alderton*, 2 Str. 1182.

<sup>3</sup> *Doctor and Stud*, 286.

<sup>4</sup> *Bohlingk v. Inglis*, 3 East's Rep. 381.

<sup>5</sup> *Roe v. Davis*, 7 *Ibid.* 263.

<sup>6</sup> 1 Esp. N. P. C. 83.

or under a *del credere* commission, or as the known representative of another, it is a right incident to his employment, to enforce the completion of them by maintaining an action in his own name<sup>1</sup>.

And after notice and tender of indemnity by the factor to the vendee of goods, the latter may, in opposition to the claim of the principal, compel the payment of the price of the goods to himself, if he has a lien on such goods for sums advanced to his principal, or for the general balance of his account<sup>2</sup>.

## *2. His Liabilities.*

It is also an admitted principle of law, that where a man is known to act merely as an agent, under a proper authority, for a known responsible principal, he is not personally responsible on the contract<sup>3</sup>. But although it is known that the agent acts in a representative character, yet if the principal is not known or notified at the time of making of the contract<sup>4</sup>, or the agent becomes expressly liable by any undertaking of his own<sup>5</sup>; or that there is no responsible principal to resort to<sup>6</sup>, the agent is liable in his individual capacity; unless some subsequent act is done to show that the vendor waved the liability of the agent, and relied upon the principal<sup>7</sup>.

These positions receive illustration from the judgement of Lord Kenyon in the case of *Owen v. Gooch*<sup>8</sup>. The mere act of ordering goods, said his lordship, does not make the

<sup>1</sup> *Bul. N. P.* 130. Per Chambre, J. in 3 *Bos. and Pul.* 49.

<sup>2</sup> *Drinkwater v. Goodwin*, *Cowp.* 256. *Atkins v. Amber*, 2 *Esp. N. P. C.* 493.

<sup>3</sup> *Ex parte Hartop*, 12 *Ves. Jun.* 352. *Johnson v. Ogilby*, 3 *P. Wms.* 279.

<sup>4</sup> *Hanson v. Roberdeau, Peake*, 120. *Mitchinson v. Hewson*, 7 *T. R.* 350.

<sup>5</sup> *Stevens v. Hill*, 5 *Esp. N. P. C.* 247. 1 *T. R.* 181.

<sup>6</sup> *Horsely v. Bell*, *Ambl.* 770. *Hardr.* 203.

<sup>7</sup> *Morgan v. Corder*, *Guildhall Sittings after E. T.* 1809.

<sup>8</sup> 2 *Esp. N. P. C.* 567.

party ordering liable. If a party orders goods from a tradesman, though in fact they are for another, if the tradesman was not informed at the time that they were for the use of another, he who ordered them is certainly liable; for the tradesman must be presumed to have looked to his credit only. So if they were ordered for another person, and the tradesman refuses to deliver them to that person's credit, but to his credit only who orders them, there is then no pretext for charging such third person; or if goods are ordered to be delivered on account of another, and after delivery the person who gave the order refuses to inform the tradesman who the person is, in order that he may sue him, under such circumstances he is himself liable. But wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable.

If an agent undertakes to deal with the goods of his principal as if he were principal himself, the party dealing with him is entitled to the same rights against him as if he were in fact the principal, if he was not aware of his representative character<sup>1</sup>.

So, if a special agent under a limited authority not to warrant goods as to soundness or the like, transgresses his instructions, he is personally responsible to the purchaser<sup>2</sup>. But a warranty by a known agent or broker, in pursuance of his authority, will not render him personally responsible to the purchaser, unless from the terms of the warranty it appears that he has pledged his own responsibility<sup>3</sup>.

So if a special agent exceeds his instructions in the pur-

<sup>1</sup> *Ante*.

<sup>2</sup> *Fenn v. Harrison*, 3 T. R. 761.

<sup>3</sup> *Ibid*.



chase of goods, he is liable to the sellers<sup>1</sup> for all loss which may be occasioned thereby<sup>1</sup>.

An agent is also personally responsible for the repayment of money deposited with him for an illegal purpose (as to induce a creditor of his principal to sign his certificate<sup>2</sup>), as long as the money has not been paid over by the agent, and that he has not given his principal fresh credit on the faith of it<sup>3</sup>.

Payment over by an agent, after he has received notice to withhold the money, will subject him to answer personally for the amount to the person from whom he received the money<sup>4</sup>.

If an agent borrows money<sup>5</sup>, or undertakes to pay money for his principal<sup>6</sup>, without being authorised to that effect, he only is personally liable.

But to the general rule of law, that agents properly authorised, contracting for a known principal, are not personally responsible on their contracts, masters of ships are an exception; for unless they expressly provide to the contrary, it has been held that they are personally responsible on all contracts made by them for repairs, &c. notwithstanding it was known to the parties executing the contract who the owners were<sup>7</sup>.

Agents are personally liable for any tortious act committed by them in the course of their employment, notwithstanding it was committed in submission to the authority of their employers<sup>8</sup>.

But an agent is not answerable for the negligence or misconduct of those whom he has retained for the service of his

<sup>1</sup> *East India Company v. Hensley*, 1 Esp. N. P. C. 112.

<sup>2</sup> *Smith v. Bromley*, Doug. 670.

<sup>3</sup> *Buller v. Harrison*, Cowp. 565.

<sup>4</sup> *Hardacre v. Stewart*, 5 Esp. N. P. C. 103.

<sup>5</sup> 1 Eq. Ca. Abr. 303.

<sup>6</sup> *Johnson v. Ogilby*, 3 P. Wms. 277.

<sup>7</sup> *Rich v. Coe*, Cowp. 636.

<sup>8</sup> *Perkins v. Smith*, 1 Wils. 323.

principal, unless the act from which the damage arises was done by the express orders of the agent<sup>1</sup>.

Neither are the agents of government answerable for the contracts made by them in their public capacity, if it is known at the time the contracts are entered into that they are acting in that capacity, and that they do not render themselves liable by any thing amounting to a personal contract<sup>2</sup>.

## CHAPTER X.

### OF BILLS OF EXCHANGE, PROMISSORY NOTES, &c.

#### 1. Of the Nature and Properties of a Bill of Exchange.

BILLS of exchange are either foreign or inland : *foreign* when drawn by a person residing abroad upon his correspondent in England, or vice versâ ; and *inland* when both the drawer and drawee reside within the same country.

Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now inland bills of exchange are, by the statutes 9 and 10 Will. III. c. 17. and 3 and 4 Anne, c. 9. put upon the same footing as foreign ones ; what was the law and custom of merchants with regard to the one, and taken notice of merely as such, is by these statutes expressly enacted with regard to the other<sup>3</sup>.

The properties of a bill of exchange are, 1. That, if assigned, the indorsee or assignee may sue thereon, in his own name, contrary to the rule of law, that no action can be maintained on the assignment or transfer of a chose in action, unless it be brought in the name of the assignor ; the

<sup>1</sup> Stone v. Cartwright, 6 T. R. 411.  
<sup>2</sup> 1 T. R. 172.

<sup>3</sup> 2 Bl. Com. 467.

<sup>2</sup> Macbeath v. Haldimand,

consequence of which exception to the general rule is, that no release by the drawer to the acceptor, nor set-off or cross demand, due from the former to the latter, can affect the payee or indorsee's right of action against the acceptor. And, 2 That although a bill of exchange is not a specialty, but merely a simple contract, yet it will be presumed to have been originally given for a good and valuable consideration, unless in an action brought against the defendant by the person with whom he was immediately concerned in the negotiation of the bill, or by a person who has given no value for it, in which cases he may give in evidence that he has not received any consideration for it <sup>1</sup>.

Bills of exchange are within the statute of limitations : but the operation of the statute does not begin to take place from the date, but from the time the bill becomes due, or is payable <sup>2</sup>.

By the statute 17 Geo. III. c. 30. all bills of exchange, or drafts in writing, being negotiable or transferable for the payment of twenty shillings, or any sum of money above that sum, and under five pounds; or on which twenty shillings or above that sum, and less than five pounds, shall remain undischarged, must be payable within twenty-one days after the day of the date thereof, shall express the names and places of abode of the persons respectively to whom or to whose order the same shall be payable, and shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto.

And by the statute 15 Geo. III. c. 51. no inland bill or draft can be drawn for any sum under twenty shillings, on pain of forfeiting twenty pounds.

<sup>1</sup> 1 Selw. N. P. 317. Chitty, 6, 16.

<sup>2</sup> Wittersheim v. Countess of Carlisle, 1 Hen. Bl. 631. *Renew v. Axton*, Carth. 3.

## 2. Of the Parties to a Bill of Exchange.

The person who makes or draws the bill is termed the drawer ; he to whom it is addressed is, before acceptance, called the drawee, and afterwards the acceptor. The person in whose favour it is drawn, is termed the payee, and when he indorses the bill, the indorser ; and the person to whom he transfers it is called the indorsee ; and in all cases the person in possession of the bill is called the holder <sup>1</sup>.

But besides these immediate parties, a person may become a party to it in a collateral way ; as where the drawee refuses to accept, any third party, after protest for non-acceptance, may accept for the honour of the bill, generally, or of the drawer, or of any particular indorser, in which case an acceptance is called an acceptance *supra protest*, and the person making it is styled the acceptor for the honour of the person on whose account he comes forward ; and he acquires certain rights, and subjects himself to nearly the same obligations as if the bill had been directed to him. A person may also become party to the instrument by paying it *supra protest*, either for the honour of the drawer or indorsers <sup>2</sup>.

All persons, whether merchants or not, having capacity and understanding to contract, may be parties to a bill of exchange <sup>3</sup>.

Corporations, by the intervention of their agents, may be parties to a bill of exchange ; but by the statutes 6 Anne, c. 22. s. 9. and 15 Geo. II. c. 13. s. 5. it is not lawful for any body politic or corporate whatsoever, other than the governor and company of the bank of England, or for persons united in covenants or partnership, exceeding the number of six persons, in England, to borrow or take up any sum

<sup>1</sup> Chitty, 2.<sup>2</sup> Ibid. 28.<sup>3</sup> Carth. 82. Salk. 125.

or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the privilege of exclusive banking granted to the governor and company of the bank of England.

An infant cannot bind himself by a bill or note drawn in the course of trade<sup>1</sup>; nor can an action be supported against him on a bill or note given by him even for necessities<sup>2</sup>, if in the hands of a third person, for he would then be precluded disputing the value of the necessities<sup>3</sup>. But if, after attaining his full age, he expressly promises payment of such bill, it will be as operative against him as if he had been of age at the time it was made<sup>4</sup>. To create this liability, however, neither a bare acknowledgement of the debt, nor a promise to pay part, nor even an actual payment of part, is sufficient<sup>5</sup>.

A feme covert cannot bind herself by drawing a bill of exchange, though she has a separate maintenance secured to her by deed, and is living apart from her husband<sup>6</sup>; unless he is transported, banished, or the like<sup>7</sup>. Neither will a promise after the death of her husband operate so as to render her liable<sup>8</sup>.

But though no action can be supported on a bill against a person incapacitated to draw, indorse, or accept it, such bill will nevertheless be valid against all other competent persons, parties to it subsequent to such incapacitated person<sup>9</sup>.

<sup>1</sup> Williams v. Harrison, Carth. 160.

<sup>2</sup> Williamson v. Watts, 1 Camp. N. P. C. 552.

<sup>3</sup> But it seems that a promissory note given by an infant for necessities would be binding, if payable only to the person who supplied them. (Co. Lit. 172. a. 1 Camp. N. P. C. 552. n.)

<sup>4</sup> Taylor v. Croker, 4 Esp. N. P. C. 187.

<sup>5</sup> Thrupp v. Fielder, 4 Ibid. 628.

<sup>6</sup> Marshall v. Rutton, 8 T. R. 545.

<sup>7</sup> De Gaillon v. L'Aigle, 1 Bos. and Pul. 358.

<sup>8</sup> Lloyd v. Ler, 1 Str. 93.

<sup>9</sup> Holt v. Clarendieux, 2 Str. 937.



A person may become a party to a bill of exchange, not only by his own act, but also by that of his agent or partner; in which case he is said to draw, accept, or indorse by procuration<sup>1</sup>.

Bills of exchange may be drawn by a party's agent or attorney, who may be constituted by parol<sup>2</sup>. But in such case it is incumbent on the agent, if required, to produce his authority to the holder; and if he does not, the owner may treat the bill as dishonoured<sup>3</sup>.

When a person draws, accepts, or indorses a bill as agent<sup>4</sup>, unless he states that he draws, &c. as agent, his principal will not be bound<sup>5</sup>. Besides, should an agent draw, accept, or indorse a bill in his own name, which was directed to him personally, and not to his principal, he will be personally liable, although such direction described him in his official character, unless he states that he acts as agent<sup>6</sup>. An agent, however, contracting on the behalf of government need not describe himself as agent<sup>7</sup>.

Where there are joint traders, and one of them, during the existence of the partnership, draws, accepts, or indorses a bill or note, in the name, or as on the behalf of the firm, such acceptance, indorsement, &c. will render the other partners liable, although they were ignorant that the bill was negotiated by such partner for his own individual benefit; and no subsequently acquired knowledge by the creditor taking the bill, that such acceptance, &c. was made without the consent or concurrence of the other partners, will defeat his claim against the whole partnership concern<sup>8</sup>. But the acceptance, &c. of one of several partners, on behalf

<sup>1</sup> Beawes, pl. 83.

<sup>2</sup> 7 T. R. 209.

<sup>3</sup> Beawes, pl. 87.

<sup>4</sup> The duty of an agent employed in the negotiation of bills of exchange is, first, to endeavour to procure acceptance; secondly, on refusal, to protest for non-acceptance; thirdly, to advise the remitter of the receipt, acceptance, or protesting; and fourthly, to advise any third person that is concerned; and all this without any delay (Beawes).

<sup>5</sup> *Barlow v. Bishop*, 1 East's Rep. 431.

<sup>6</sup> *Appleton v. Binks*, 5 Ibid. 143.

<sup>7</sup> *Rice v. Chute*, 1 Ibid. 579.

<sup>8</sup> *Swan v. Steele*, 7 East's Rep. 210.

of himself and copartners, will not bind the others if it be given for his individual debt, and the holder of the bill at the time he became so was aware of that circumstance<sup>1</sup>.

And after a dissolution of a partnership by agreement, an express authority given to one of the persons who composed the firm to settle the partnership affairs, as to receive all debts owing to, and to pay those due from the partnership previous to its dissolution, will not authorise him to draw, accept, or indorse a bill of exchange in the partnership name, even for a debt that existed prior to the dissolution; it being a principle of law, that the moment the partnership ceases, the partners are distinct persons, and from that time tenants in common of the partnership property<sup>2</sup>.

On the same principle, after an act of bankruptcy by one of several copartners, the bankrupt partner cannot bind the partnership by any bill or note which may be issued by him after that event<sup>3</sup>.

It is not necessary that a partner when he draws, accepts, or indorses a bill on behalf of the partnership, should express the name of the firm, or all the partnership names; it will be sufficient to bind the firm if he subscribes his own name only<sup>4</sup>.

If the members of a copartnership, each in his individual capacity, employ one factor, and one of them accepts a bill drawn upon all by the factor, the acceptance will not bind the rest<sup>5</sup>.

### *3. Of the Requisites of a Bill of Exchange.*

In order to constitute a bill of exchange or promissory note, no particular form or precise words are requisite<sup>6</sup>: an

<sup>1</sup> *Sheriff v. Wilkes*, 1 East's Rep. 48. *Henderson v. Wild*, 2 Camp. N. P. C. 561.

<sup>2</sup> *Kilgour v. Finlyson*, 1 Hen. Bl. 155. *Abel v. Sutton*, 3 Esp. N. P. C. 108.

<sup>3</sup> *Thomason v. Frere*, 10 East's Rep. 418.

<sup>4</sup> *Mason v. Rumsey*, 1 Camp. 384.

<sup>5</sup> *Beawes*, pl. 228.

<sup>6</sup> *Com. Dig. tit. Obligation*, B. 1, 2.

order or promise to deliver money, or to receive money, or to be accountable or responsible for it, will be sufficient for this purpose<sup>1</sup>.

The two requisites essential to the validity of a bill or note are: first, that it be payable at all events, and not dependent on any contingencies. Thus an order or promise of payment out of money *when received*, or the produce of merchandise *when disposed of*, is no bill of exchange; because of the uncertainty whether one will be received, or the other disposed of; or that its produce when disposed of will be sufficient<sup>2</sup>.

Neither is a bill or note valid if the payment depends upon a condition; as if an order or promise be given "to pay money on demand, or surrender A. B. to prison within a limited time;" "or provided A. B. shall not pay the money by a particular day;" or a promise to pay within a month, if A. B. did not pay<sup>3</sup>.

So if payment be directed to be made out of a particular fund, it will render the bill inoperative on account of the uncertainty to which the payment is subject. Thus a bill drawn by an officer on his agent, requiring him to pay so much out of his growing subsistence, was held to be no bill of exchange<sup>4</sup>. So an order to pay out of rents or other money<sup>5</sup>; or on the sale or produce of certain property<sup>6</sup>; or out of money when received<sup>7</sup>; or out of the drawer's money, which should arise from his reversion of ——— when sold<sup>8</sup>, although it is averred in the declaration that the money and the rents have been received, and that the property and the reversion have been sold; is inoperative as a bill.

<sup>1</sup> 8 Mod. 364.

<sup>2</sup> Dawkes v. Lord Delorain, 2 Bl. Rep. 782. 3 Wils. 207, S. C.

<sup>3</sup> Smith v. Boheme, 2 Ld. Raym. 1396. Colehan v. Cooke, Willes, 397.

<sup>4</sup> Ibid.

<sup>5</sup> Jenney v. Merle, Str. 592.

<sup>6</sup> Hill v. Halford, 2 Bos. and Pul. 413.

<sup>7</sup> Wilkes v. Adcock, 8 T.R. 28.

<sup>8</sup> Carlos v. Fancourt, 5 T.R. 482.

The second requisite to render a bill or note valid, is, that it must be for the payment of money only, and not for the payment of money and the performance of some other act, or in the alternative. And therefore a promise “to pay money and deliver up horses and a wharf on a particular day,” does not amount to a bill or note within the statute<sup>1</sup>. And to render bills or notes effectual, they must be for the payment of money in specie, otherwise they will be inoperative. On this principle, therefore, a written promise to pay three hundred pounds to B. or order, “in good East India bonds,” is not a bill or note within the statute<sup>2</sup>.

And if a bill or note be insufficient in its formation in either of these particulars, no subsequent transaction, rendering the payment no longer contingent, will give it validity.

If, however, the event on which the payment is to depend must inevitably happen, as if the payment is to be made within a certain time after the drawer’s coming of age<sup>3</sup>, or after the death of his father or the like<sup>4</sup>, the bill will be valid and negotiable.

So, the statement of a particular fund will not vitiate a bill of exchange, if it is made payable at all events, but is inserted merely by way of direction to the drawee, how he should reimburse himself. And therefore where J. S. drew a bill on J. N., and directed him one month after date to pay to A. B. or order, a certain sum of money “as his quarter’s half-pay from the 24th of June to the 25th of September next in advance,” the bill was held to be valid<sup>5</sup>.

The other principal requisites of a bill of exchange are,

First, That it be properly stamped ; for unless it be duly

<sup>1</sup> *Martin v. Chauntry*, 2 Str. 1271.

<sup>2</sup> *Bul. N. P.* 272.

<sup>3</sup> *Goss v. Nelson*, 1 Bur. 226.

<sup>4</sup> *Cooke v. Colehan*, Str. 1217.

<sup>5</sup> *Macleed v. Snell*, 2 Str. 762.

stamped, and that not only with a stamp of the proper value<sup>1</sup>, but also of the proper denomination, it cannot be read in evidence, nor can it be in any way available<sup>2</sup>.

Secondly, That the date ought to be clearly expressed. If, however, no date be expressed, it will be intended to bear date on the day on which it was issued<sup>3</sup>.

Thirdly, That every bill of exchange ought to be given for a good and valuable consideration. But no evidence of want of consideration, or insufficiency of the amount thereof, will impeach the validity of a bill, as between the acceptor or drawer and a third person holding the bill for value given, although the holder knew at the time of his becoming so that no consideration had been given for the bill<sup>4</sup>. Between the drawer and acceptor, the drawee, the payee and his agent, and the indorsee and his immediate indorser, however, no bill will be invalidated for the want of consideration<sup>5</sup>, or the original insufficiency of the amount<sup>6</sup>.

So, if at the time a person became holder of a bill, he knew that at its inception it was founded on an illegal transaction<sup>7</sup>; or that he became holder of it by transfer after it became due<sup>8</sup>, he cannot in either case recover on it.

So, if the holder of an accommodation bill has given value only for a part of the amount, he cannot recover beyond the sum he has given<sup>9</sup>. But it is otherwise where a bill has been given for money really due from the drawee to the drawer; for there the indorser, although he has given only a part

<sup>1</sup> By the statute 43 Geo. III. c. 127. s. 6. it is, however, enacted, that if any instrument is stamped with a stamp of greater value than that required by law, it shall be valid, provided such stamp be of the proper denomination required by law.

<sup>2</sup> Bayley's Summary, 20. n. 6. 43 Geo. III. c. 27. 44 Geo. III. c. 98. 48 Geo. III. c. 119.

<sup>3</sup> Hague v. French, 3 Bos. and Pul. 173.

<sup>4</sup> Collins v. Martin, 1 Bos. and Pul. 651. Simmonds v. Parminster, 1 Wils. 187.

<sup>5</sup> Jefferies v. Austin, Str. 674.

<sup>6</sup> Barber v. Backhouse, Peake's N. P. C. 61.

<sup>7</sup> Steers v. Lashley, 6 T. R. 61.

<sup>8</sup> Brown v. Turner, 7 Ibid. 630.

<sup>9</sup> Bacon v. Searles, 1 Hen. Bl. 38.



value for the bill, may recover the whole sum payable, holding the overplus beyond his own demand as trustee for the use of the party entitled to receive it<sup>1</sup>.

Illegality of consideration is another objection to the validity of a bill. In those cases in which the legislature has declared, that the illegality of the contract or consideration shall make the bill or note void, the holder, notwithstanding he took the bill *bonâ fide*, and gave a valuable consideration for it, can only resort to the party from whom he received it, and from whom he can recover only on the original consideration<sup>2</sup>.

But where the illegality of the bill does not fall within any statutory prohibition, the holder cannot be affected with the transaction between the original parties, unless he had either notice of the illegality<sup>3</sup>, or obtained the bill after it became due from a person who had notice of the illegal consideration for which it had been given<sup>4</sup>.

And in general, where the bill is fair and legal in its inception, a subsequent illegal contract or consideration taking place on the indorsement, &c. will not invalidate it in the hands of a *bonâ fide* holder<sup>5</sup>.

### *3. Of the Effect of Delivery of a Bill.*

If a bill of exchange is given in satisfaction of a debt<sup>6</sup>, or for the amount of goods sold<sup>7</sup>, the drawer cannot be sued for the original debt before the bill is due, neither can he go into evidence to impeach the charges on which the debt arose. But if the person delivering the bill knew that it

<sup>1</sup> *Wiffen v. Roberts*, 1 Esp. N. P. C. 9. *Barber v. Backhouse*, Peake's N. P. C. 61.

<sup>2</sup> *Bowyer v. Bampton*, Str. 1135. *Witham v. Lee*, 4 Esp. N. P. C. 264. *Webb v. Brooke*, 3 Taunt. 6.

<sup>3</sup> *Wyatt v. Bulmer*, 2 Esp. N. P. C. 538.

<sup>4</sup> *Brown v. Turner*, 7 T. R. 630.

<sup>5</sup> *Parr v. Eliason*, 1 East's Rep. 92.

<sup>6</sup> *Kearslake v. Morgan*, 5 T. R. 513.

<sup>7</sup> *Knox v. Whalley*, 1 Esp. N. P. C. 159.

was of no value, the holder may immediately sue him on his original liability<sup>1</sup>. The circumstance, however, of the bill being on a wrong stamp will not entitle the holder to sue the party before it becomes due, unless he refuses on request to give a proper bill<sup>2</sup>.

And where a bill delivered under the above circumstances has been dishonoured, if the holder has not been guilty of neglect, but has used due diligence in giving the acceptor notice thereof; the original consideration revives against his debtor, from whom he may recover the amount of the debt<sup>3</sup>.

#### 4. *Of the Effect of Alteration of a Bill.*

If a bill, &c. after it has been drawn, accepted, or indorsed, be altered in any material respect, as for instance in the date or sum, without the consent of the parties thereto, it will discharge those parties who were not privy to such alteration, from all liability thereon, though the bill may afterwards come into the hands of an indorsee not aware of the alteration<sup>4</sup>; and such alteration will have the same effect as to the drawer's liability on the original consideration, if there was no privity between him and the holder<sup>5</sup>. But a mere correction of a mistake, as by inserting the words "or order"<sup>6</sup>, or the alteration of the place where the bill is to be presented for payment<sup>7</sup>, will not vitiate a bill, or render a new stamp necessary, if the insertion or alteration is made with the consent of all the parties, and before the bill is issued, or before the time when it is to be payable<sup>8</sup>.

In general, if a bill has been altered, or any insertion been

<sup>1</sup> Puckford v. Maxwell, 6 T. R. 52.

<sup>2</sup> Swears v. Wells, 1 Esp. N. P. C. 317.

<sup>3</sup> Bolton v. Richard, 6 T. R. 139.

<sup>4</sup> Master v. Miller, 4 T. R. 320.

<sup>5</sup> Ibid.

<sup>6</sup> Kershaw v. Cox, 3 Esp. N. P. C. 246. <sup>7</sup> Trapp v. Spearman, Ibid. 57.

<sup>8</sup> Knill v. Williams, 10 East's Rep. 435. Cardwell v. Martin, 9 Ibid. 190.

made, before acceptance or indorsement, the acceptor or indorser cannot take any advantage of the alteration, for by acquiescing in such alteration he has given validity to the bill<sup>1</sup>. The effect is the same, if, on presentment of a bill for acceptance, the acceptor alters it as to the time of payment, and the holder acquiesces in such alteration and acceptance<sup>2</sup>; although, as between the drawer and prior indorsers and the holder the bill is thereby vacated<sup>3</sup>.

### *5. Of the Loss of a Bill.*

In case of the loss of a bill<sup>4</sup>, &c. transferable by mere delivery, any person who has previously to its becoming due given a bonâ fide consideration for it, may enforce payment against the acceptor and the other parties, notwithstanding he derived his interest in the bill from the person who found or stole it<sup>5</sup>. And if a lost or stolen bill, transferable by mere delivery, and for which no consideration has been given, is presented to the drawer at the time of its becoming due, and he pays it before he has notice of the loss or robbery, he will not be liable to pay it over again to the real owner<sup>6</sup>.

But when a bill transferable only by indorsement, and not indorsed, is lost by the person entitled to indorse, no person getting possession of it by a forged indorsement will acquire any interest in it, although he gave a sufficient consideration, and was not aware of the forgery; but will be liable to repay the bill to the original holder when he has regained possession of it<sup>7</sup>.

<sup>1</sup> Beawes, pl. 194.

<sup>2</sup> *Paton v. Winter*, 1 Taunt. Rep. 420.

<sup>3</sup> *Master v. Miller*, 4 T. R. 320.

<sup>4</sup> In the case of foreign bills it is usual to make three of the same tenor and date, (called a set, each of which contains a condition, that it shall be paid provided the others are not,) in order that the bearer, having lost one, may receive his money on the other. And if the drawer only gives one, he will, if it should be lost, be obliged to give another of the same tenor to the loser. Poth. pl. 39.

<sup>5</sup> *Sir John Lawson v. Weston*, 4 Esp. N. P. C. 56. *Grant v. Vaughan*, Bur. 1516.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Cheap v. Harley and Drummond*, cited in *Allen v. Dundas*, 3 T. R. 28. *Mead v. Young*, 4 *Ibid.* 28.

In case of the loss of a bill, to entitle the holder to recover, he should immediately give notice thereof to the acceptor, and all the antecedent parties; and when the bill is transferable by mere delivery, should also give public notice of the loss<sup>1</sup>; but this will not be available unless the notice of the loss be brought home to the knowledge of the party taking the bill<sup>2</sup>.

By the statute 9 and 10 Wil. III. c. 17. s. 3. it is enacted, that in case any inland bill, expressed to be for value received, and payable after date, shall happen to be lost or miscarried within the time before limited for payment of the same, the drawer must give another bill of the same tenor with that first given; the person to whom it is delivered giving security, if demanded, to the drawer, to indemnify him against all persons whatsoever, in case the said bill so alleged to be lost or miscarried shall be found again. And Marius says, p. 77, “that if the acceptor refuse, on sufficient security and indemnification offered, to pay a bill which he has accepted, he will be liable to make good all loss, re-exchange and charges.”

But notwithstanding the above statute, the owner of a bill of exchange, &c. which has been lost, cannot support an action on the bill, or on the original consideration of the bill, against the drawer or other party to the bill, so as to oblige him to give another bill of the same tenor with that first given, although a bond of indemnity has been tendered to the defendant<sup>3</sup>, except he can prove that the bill has been destroyed<sup>4</sup>; or that, after notice of the loss, the party receives a bond of indemnity from the loser<sup>5</sup>; or that the bill was not negotiable, or has not been indorsed, or has

<sup>1</sup> Beawes.

<sup>2</sup> Sir John Lawson v. Weston, 4 Esp. N. P. C. 56.

<sup>3</sup> Bevan v. Hill, 2 Camp. N. P. C. 38.

<sup>4</sup> Pierson v. Hutchinson, 2 Camp. N. P. C. 212. 6 Esp. N. P. C. 126.

<sup>5</sup> Williamson v. Clements, 1 Taunt. 523.

been only specially indorsed<sup>1</sup>; or that it was lost after it was due<sup>2</sup>. A court of equity will, however, in all cases of the loss of a bill, compel payment, or a new bill to be given, on proper indemnity being given by the loser, to protect the defendant from being compelled to pay the bill over again to a bonâ fide holder<sup>3</sup>. And if such indemnity has been tendered, the defendant will in general have to pay the costs in equity.

#### 6. *Of the Liability of the Drawer.*

If the drawee refuses to accept or to pay the bill, on such refusal the drawer is immediately liable to an action for the amount thereof, the payee or holder of the bill not being obliged to wait until the time arrives which is specified for payment in the bill<sup>4</sup>. But if a bill drawn by a person abroad on another in this country be refused acceptance or payment, the drawer will, if discharged by the foreign law, be discharged in this country<sup>5</sup>.

Where a bill has been accepted for accommodation, if the acceptor sustains any loss in consequence of such acceptance, the drawer must indemnify him<sup>6</sup>.

#### 7. *Of the Presentment of a Bill for Acceptance.*

When a bill is drawn within a certain time after sight, in order to fix the time when the bill is to be paid, it must be presented to the drawee for acceptance<sup>7</sup>. And in all cases where it is necessary for the holder to present a bill for acceptance, due diligence must be used that the bill be presented within a reasonable time<sup>8</sup>: the neglect of doing which can only be excused by proving that the drawer or

<sup>1</sup> Long v. Baillie, 2 Camp. N. P. C. 214. n.

<sup>2</sup> Finson v. Francis, 1 Ibid. 19. <sup>3</sup> Mossop v. Eadon, 16 Ves. Jun. 430.

<sup>4</sup> Mellish v. Simeon, 2 Hen. Bl. 379.

<sup>5</sup> Cook v. Tower, 1 Taunt. Rep. 372. Porter v. Brown, 5 East's Rep. 121.

<sup>6</sup> Poth. pl. 97.

<sup>7</sup> Mullman v. D'Eguino, 2 Hen. Bl. 365.

<sup>8</sup> Ibid.



other person insisting on it as a defence, had no effects in the hands of the drawee, or had given no consideration for the bill<sup>1</sup>. Illness, or any other reasonable cause not attributable to the misconduct of the holder, will also excuse a presentment within a reasonable time<sup>2</sup>.

On the presentment of a bill the drawee is entitled to keep it twenty-four hours in his possession after the presentment, for the purpose of examining whether he has any effects of the drawer's in his hands<sup>3</sup>. But if he should require further time, the holder should give immediate notice to the indorsers and drawer of the circumstance<sup>4</sup>.

In all cases of presentment for acceptance, or payment, of a bill, it is incumbent on the holder to present it at the house of the drawee<sup>5</sup>. If he has removed, the holder must use every reasonable endeavour to find out where he has removed, and make presentment there<sup>6</sup>. In case of his decease, presentment must be made to his personal representative, if he lives within a reasonable distance<sup>7</sup>. But if, on inquiry, it appears that the drawee never lived at the place where the bill states him to reside, or that he has absconded, then the bill is to be considered as dishonoured<sup>8</sup>.

### *8. Of the Acceptance of a Bill of Exchange.*

An acceptance may be either absolute or qualified. But whether an acceptance be absolute or qualified, is a question of law<sup>9</sup>. An absolute acceptance is an engagement to pay the bill according to its tenor. The most usual and formal method of making such an acceptance, is for the drawee to write on the bill the word "accepted," and subscribe his

<sup>1</sup> *De Berdt v. Atkinson*, 2 Hen. Bl. 336.

<sup>2</sup> See post, Dishonour of a Bill by Non-acceptance, &c.

<sup>3</sup> *Beawes*, pl. 17.

<sup>4</sup> *Molloy*, b. ii. c. 10. pl. 16.

<sup>5</sup> *Cromwell v. Hynson*, 2 Esp. N. P. C. 511.

<sup>6</sup> *Collins v. Butler*, 2 Str. 1057.

<sup>7</sup> *Molloy*, b. ii. c. 10. s. 34.

<sup>8</sup> *Lord Raym.* 743.

<sup>9</sup> 1 T. R. 182.

name; or to write the words “accepted,” “seen<sup>1</sup>,” “presented<sup>2</sup>,” the day of the month<sup>3</sup> only; or merely to subscribe his name at the bottom, or across the bill. For the convenience, however, of mercantile affairs, an acceptance, or a promise to accept, by collateral writing, or even by parol, is equally binding with an acceptance on the face of the bill<sup>4</sup>. Any act, indeed, of the drawee, which demonstrates a consent to comply with the request of the drawer, will constitute an acceptance. A promise of this nature, “Leave the bill, and I will accept it,” will amount to an acceptance, although the holder had no consideration for the promise<sup>5</sup>. A direction to a third person to pay the bill<sup>6</sup>, written thereon, or on any other paper relating to the transaction, will amount to an acceptance<sup>7</sup>. A verbal or written promise to accept, at a future period, a bill already drawn, or that a bill then drawn shall meet due honour<sup>8</sup>, or shall be accepted, or certainly paid when due<sup>9</sup>, amounts to an absolute acceptance. And although, regularly, a bill ought to be accepted before the day on which the money is to be paid, yet an acceptance after the day will bind the drawee<sup>10</sup>. The drawer and indorsers are, however, discharged, unless due notice of non-acceptance, or non-payment, at the time the bill became due, were given<sup>11</sup>.

An acceptance may be implied as well as expressed; and this implied acceptance may be inferred from the drawer’s keeping the bill a great length of time<sup>12</sup>, which induces the holder not to protest it, or to consider it as accepted<sup>13</sup>.

<sup>1</sup> Poth. pl. 45.      <sup>2</sup> Vin. Abr. tit. Bills of Exch. l. 4.      <sup>3</sup> Comb. 401.

<sup>4</sup> *Lumley v. Palmer*, 2 Str. 1090.    Rep. Temp. Hardw. 74. S. C.    *Powell v. Mounier*, 1 Atk. 611.    *Wynne v. Raikes*, 5 East’s Rep. 514.    *Clarke v. Cock*, 4 Ibid. 57.

<sup>5</sup> *Bul. N. P.* 270.      <sup>6</sup> *Moor v. Whithy*, Bur. 1663. 1 *Bul. N. P.* 270.

<sup>7</sup> *Pillans v. Van Mierop*, Bur. 1663.      <sup>8</sup> *Clark v. Cock*, 4 East’s Rep. 70.

<sup>9</sup> *Wynne v. Raikes*, 5 Ibid. 514.

<sup>10</sup> *Jackson v. Pigott*, Carth. 459.    *Ld. Raym.* 364.    *Salk.* 127.

<sup>11</sup> *Mitford v. Walcott*, 12 Mod. 410.      <sup>12</sup> *Powell v. Mounier*, 1 Atk. 611.

<sup>13</sup> *Bayley*, 42. n. 3.

But a promise to accept a bill not in existence at the time the promise to accept was given, but which was to be drawn at a future time, has been held not to amount to an acceptance, unless it influences some person to take or retain the bill <sup>1</sup>.

And by the usage of trade in London, a banker may retain a check drawn on him, till five o'clock in the afternoon of the day on which it was presented for payment; and such retention of the bill will not be considered as equivalent to an acceptance, although it may have been cancelled by mistake <sup>2</sup>.

Neither will the expression "There is your bill, all is right," amount to an acceptance, unless intended to induce the holder to conceive it as such <sup>3</sup>.

Nor will the entry of a bill in the drawee's bill-book, and the minuting upon it the day of the month, constitute an acceptance, if it appears to be the drawee's practice to enter all his bills, whether he meant to accept them or not <sup>4</sup>.

A qualified acceptance is when the drawee undertakes to pay the bill in any other manner than according to the tenor and effect thereof. This species of acceptance, if qualified with a condition, is called a conditional acceptance. The holder of the bill may consider a qualified acceptance as a nullity, and protest the bill for non-acceptance <sup>5</sup>; but if he does receive it, he should, in order to bind the other parties to the bill, give immediate notice of the nature of the acceptance offered <sup>6</sup>.

Any act which evinces an intention not to be bound, unless upon a certain event, is a conditional acceptance. Thus, an acceptance by the drawee of a bill, to pay, "when goods

<sup>1</sup> *Johnson v. Collings*, 1 East's Rep. 98. *Castling v. Aubert*, 2 East's Rep. 325.

<sup>2</sup> *Fernandez v. Glynn*, 1 Camp. 426.

<sup>3</sup> *Powel v. Jones*, 1 Esp. N. P. C. 17.

<sup>4</sup> *Powell v. Mounier*, 1 Atk. 611.

<sup>5</sup> *Selw. N. P.* 350.

<sup>6</sup> *Chitty*, 155.

consigned to him were sold<sup>1</sup>,” or, “as remitted for<sup>2</sup>,” have been held to be a conditional acceptance, and not to render the acceptor liable to the payment of the bill until the contingency has taken place, when such conditional acceptance will become as binding as an absolute one<sup>3</sup>.

An acceptance may also be partial; as when the drawee undertakes to pay part of the sum for which the bill is drawn, or to pay at a different time or place<sup>4</sup>. But in all cases of a conditional or partial acceptance, the holder should, if he means to resort to the other parties to the bill, in default of payment, give notice to them of such conditional or partial acceptance<sup>5</sup>. And in the like circumstances the acceptor should be careful to express in the acceptance the condition he may think proper to annex; for, if the condition is not expressed in a written acceptance, he will not be entitled to avail himself of it against any subsequent party between him and the person to whom the acceptance was given, who took the bill without notice of the condition, and gave a valuable consideration for it. But if the agreement to accept is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to those conditions<sup>6</sup>.

If a bill be accepted payable at the house of the acceptor's banker, the party taking such special acceptance must present it for payment within the usual banking hours (which in London do not extend beyond five o'clock), at the place where it is made payable<sup>7</sup>.

In case of the failure of the drawer, the drawee ought not to accept bills after he is aware of that circumstance<sup>8</sup>. But if the drawee accept a bill drawn upon him after the bank-

<sup>1</sup> *Smith v. Abbot*, 2 Str. 1152.

<sup>2</sup> *Banbury v. Lisset*, 2 Str. 1212.

<sup>3</sup> 1 T. R. 182. Str. 1212.

<sup>4</sup> Mar. 68. 84. *Molloy*, 283.

<sup>5</sup> *Ibid.*

<sup>6</sup> Per *Ld. Mansfield* in *Mason v. Hunt*, Doug. 299.

<sup>7</sup> *Parker v. Gordon*, 7 T. R. 385.

<sup>8</sup> *Pickerton v. Marshall*, 2 Hen. Bl. 334.

ruptcy of the drawer, he will, by the statute 1 Jac. I. c. 15. be justified in paying his acceptance, if he had no knowledge of such bankruptcy at the time of his accepting the bill<sup>1</sup>.

On refusal of acceptance, either wholly or partially, the holder may insist on immediate payment by all the parties whose names appear upon the bill<sup>2</sup>.

### *9. Of the Liability and Discharge of the Acceptor.*

It has already been observed, that an acceptor will not be released from his liability to discharge a bill, on the ground that he has not received a consideration, although that circumstance was known to the holder. His responsibility is also in general irrevocable; for from the current of cases it appears, that if the drawee of a bill puts his name upon it as acceptor, he cannot afterwards, even before it has been delivered to the payee, discharge his acceptance by erasing his name, unless such acceptance has been made by mistake<sup>3</sup>.

The responsibility of the acceptor cannot be discharged but by payment, express release, or by the statute of limitations<sup>4</sup>. No indulgence granted to the acceptor or drawer will have that effect. Neither will the receiving a part of the amount of the bill from the drawer, and granting an enlarged time for the payment of the residue, discharge the acceptor's liability<sup>5</sup>. And an alteration by the holder of a partial into an absolute acceptance, will not release the acceptor from his liability under his partial acceptance<sup>6</sup>.

But an acceptor is discharged by the alteration of the

<sup>1</sup> Wilkins v. Casey, 7 T. R. 711.

<sup>2</sup> Ballingalls v. Gloster, 3 East's Rep. 481. Puckford v. Maxwell, 6 T. R. 52.

<sup>3</sup> Trimmer v. Oddy, Guildhall Sittings, July 12, 1800. Thornton v. Dick,

<sup>4</sup> Esp. N. P. C. 70. Bentinck v. Dorian, 6 East's Rep. 199.

<sup>5</sup> Dingwall v. Dunster, Doug. 247.

<sup>6</sup> Ellis v. Gallindo, Ibid. 250. n.

<sup>7</sup> Master v. Miller, 4 T. R. 336.



bill<sup>1</sup>, or of his acceptance<sup>2</sup>, if made without his privity. So, if a bill is made payable at a banker's, and it is not presented there, the acceptor is discharged from his liability, if he can prove that he has sustained damage in consequence of the holder's laches<sup>3</sup>. In case of an accommodation-acceptance, the acceptor will be discharged, if the holder, after notice that the bill had been accepted for the accommodation of the drawer, gives time to the drawer without the acceptor's concurrence<sup>4</sup>. Or if, upon an offer of a conditional or partial acceptance by the drawee, the holder gives a general notice of non-acceptance, omitting to state such conditional or partial acceptance, the drawee will be released from all responsibility<sup>5</sup>.

In cases of accommodation-acceptances, it is advisable to have a written undertaking, or a counter-bill or note, from the drawer, in order to indemnify the acceptor. If the undertaking is for a sum above 20*l.*, it must be stamped as an agreement. Where the accommodation-acceptor is indebted to, or has any property of the drawer in his hands, in case of the insolvency of the drawer, or where there is any ground of apprehending such an event, he may retain the same for the payment of the bill until it is delivered up to him, or he is indemnified against his liability as acceptor<sup>6</sup>.

#### 10. *Of the Indorsement and Transfer.*

An indorsement of a bill or note is usually made upon the back of the bill, and must be in writing: but no set form of words is necessary for this purpose; and therefore, if a man writes his name upon the back, or any other part of a bill of exchange, or "This is to be paid to J. S.," or, "Pay

<sup>1</sup> *Master v. Miller*, 4 T. R. 336.

<sup>2</sup> *Long v. Moore*, 3 Esp. N. P. C. 155.

<sup>3</sup> *Bishop v. Chitty*, Str. 1198.

<sup>4</sup> *Laxton v. Peal*, 2 Camp. N. P. C. 185.

<sup>5</sup> *Sproat v. Matthews*, 1 T. R. 182.

<sup>6</sup> *Wilkins v. Casey*, 7 T. R. 711. *Madden v. Kempster*, 1 Camp. N. P. C. 12.

the contents to J. S.," and signs his name to it, it will be a good indorsement <sup>1</sup>.

But by the 17th Geo. III. c. 30. s. 1. the indorsement of a bill or note for the payment of less than five pounds must mention the name and place of abode of the indorsee, and bear date at or before the time of making it; and must be attested by one subscribing witness.

If a person authorises another to indorse for him, the agent must merely write the name of his principal, or indorsee, as "*Per procuration G. H. A. B.*" otherwise the indorsement will be inoperative <sup>2</sup>.

Indorsements are of two kinds, in blank or in full. An indorsement in blank, which is the most common, is made by writing the indorser's name upon the back of the bill, without any mention of the name of the person in whose favour the indorsement is made. A full or special indorsement is where the name of the indorsee, in whose favour the indorsement is made, is mentioned, as thus, "Pay the contents to A. B. or order," and is subscribed with the name of the indorser.

The negotiability of a bill originally transferable may be restrained by express restrictive words; for, the payee or the indorsee having the absolute property in the bill, he may by express words restrict its currency, by indorsing it "Payable to J. S. only," or, "To J. S. for his use;" or any other words clearly demonstrating his intention to make a restrictive and limited indorsement <sup>3</sup>.

An indorsement of a bill of exchange may be made at any time, either before it is complete, or after the time appointed for the payment of it. If it is indorsed before it is complete, as if a man indorse his name upon a blank stamped piece of paper, it will have the effect of binding the indorser to the amount of any sum which may be inserted, consistent with

<sup>1</sup> 3 New Abr. 613.

<sup>2</sup> Wilks v. Back, 2 East's Rep. 144.

<sup>3</sup> Edie v. the East India Company, Bur. 1216.

the stamp, and made payable at any date<sup>1</sup>. If the indorsement takes place after the time of the bill's becoming due, in order to make the transfer valid, the bill must remain unpaid by some of the parties<sup>2</sup>. And if a bill is indorsed before the day on which it bears date, and the payee dies before the day of payment, such indorsement is valid<sup>3</sup>. But bills drawn for less than five pounds cannot by the statute 17 Geo. III. c. 30. s. 1. be indorsed after the time of their becoming due.

With respect to a transfer made before a bill is due, and one made after it is over-due, there is a material distinction. In the former case the assignee is not bound to inquire into any circumstances existing between the assignor and any of the previous parties to the bill, as he will not be affected by them<sup>4</sup>. But in the latter, whether the transfer has been made by indorsement or mere delivery, it is incumbent on the indorsee to satisfy himself that the note is a good one; and if he omits so to do, he takes it on the credit of the indorser, and must stand in the situation of the person who was holder at the time of its becoming due<sup>5</sup>.

Bills payable to order, or to bearer, are equally negotiable from hand to hand *ad infinitum*.

But, in general, unless the operative words of transfer, viz. or "order" or "bearer," or some other words authorising the payee to assign it, be inserted therein, it cannot be transferred so as to give the assignee a right of action against any of the parties except the indorser himself<sup>6</sup>; unless the negotiable words were omitted by mistake<sup>7</sup>. The omission, however, of negotiable words will not affect the validity of a bill<sup>8</sup>. And in all cases, though no operative

<sup>1</sup> *Boehm v. Stirling*, 7 T. R. 430.      <sup>2</sup> *Bacon v. Searles*, 1 Hen. Bl. 88.

<sup>3</sup> *Pasmore v. North*, Guildhall Sittings after Hil. Term, 1811, K. B.

<sup>4</sup> *Brown v. Davis*, 3 T. R. 82.

<sup>5</sup> *Ibid.* 80.    *Tinson v. Francis*, 1 Camp. N. P. C. 19.

<sup>6</sup> *Hill v. Lewis*, 1 Salk. 132.

<sup>7</sup> *Kershaw v. Cox*, 3 Esp. N. P. C. 246.

<sup>8</sup> *Smith v. Kendall*, 6 T. R. 123.

words of transfer are inserted in a bill, yet it will always have the same operation against the party making the transfer as if he had had power to assign<sup>1</sup>.

A transfer by delivery, without any indorsement, when made on account of a preexisting debt, or for goods sold at the time of the assignment, imposes an obligation on the assignor in favour of the assignee, similar to that of a transfer by indorsement; and in default of payment by the drawee, the assignee may maintain an action against the assignor on the consideration of the transfer<sup>2</sup>; unless it was expressly agreed at the time of the transfer, that the assignee should take the bill assigned as payment, and run the risk of its being paid<sup>3</sup>, or that he has been guilty of laches.

As to the capacity of transferring a bill of exchange, it may be said in general, that a valid transfer may be made by all persons who have an absolute property in it. And if indorsed bills be delivered to a banker, to be received when due<sup>4</sup>, or to an agent for a particular purpose<sup>5</sup>, and they negotiate them on their own account, the holder will be entitled to retain the bills, however fraudulent the conduct of the agent or banker, if he has given a valuable consideration for them, and was not acquainted with the trust on which they were deposited.

If an indorsement is made in favour of an infant, and he indorses it in favour of another, no recovery can be had on that indorsement against the infant, because he cannot render himself liable on his contract: yet as it is to be presumed, unless the contrary appears on the face of the indorsement, that every indorsee has given a valuable con-

<sup>1</sup> *Hodges v. Stewart*, 1 Salk. 125. *Ballingalls v. Gloster*, 3 East's Rep. 482.

<sup>2</sup> *Moore v. Warren*, 1 Str. 415. *Owenson v. Morse*, 7 T. R. 65. *Ex parte Blackburne*, 10 Ves. Jun. 201.

<sup>3</sup> 7 T. R. 65.

<sup>4</sup> *Collins v. Martin*, 1 Bos. and Pul. 618.

<sup>5</sup> *Bolton v. Puller*, *ibid.* 516.

sideration, the infant's indorsement cannot be considered as such a restraint upon the negotiability of the bill as to prevent the indorsee's recovery against the acceptor or drawer, or any of the other indorsers <sup>1</sup>.

Where a bill has been made to a feme covert <sup>2</sup>, or to a feme sole who afterwards marries <sup>3</sup>, the right of transfer vests in her husband, and the indorsement must be in his name.

And in the case of bankruptcy, the right of transfer of a bill or note is vested in the assignees from the time of the act of bankruptcy <sup>4</sup>. But if a trader delivers a bill for a valuable consideration previously to an act of bankruptcy, without indorsing it, it has been held that he may indorse it after his bankruptcy <sup>5</sup>.

As to the effect of a transfer by indorsement, it vests in the holder a right of action against all the precedent parties whose names are on the bill; and he may recover judgement against all, if satisfaction be not made by the payment of the money before judgement obtained against all; and proceedings will not be stayed in any one action but on payment of debts and costs in that action, and the costs in all the others in which the holder has obtained judgement <sup>6</sup>.

But unless the payee, or the drawer, when the bill was payable to his order, has first indorsed it, a party who becomes possessed of it can sue the person only from whom he obtained it <sup>7</sup>.

<sup>1</sup> Taylor v. Croker, 4 Esp. N. P. C. 187.

<sup>2</sup> Barlow v. Bishop, 1 East's Rep. 432.

<sup>3</sup> Hatchet v. Baddeley, 2 Bl. Rep. 1081.

<sup>4</sup> Pinkerton v. Marshall, 2 Hen. Bl. 335.

<sup>5</sup> Smith v. Pickering, Peake's N. P. C. 59.

<sup>6</sup> Miller v. Race, Bur. 452. Grant v. Vaughan, Ibid. 1516.

<sup>7</sup> Peacock v. Rhodes, Doug. 633.



11. *Of Presentment for Payment.*

When a time of payment is specified in a bill of exchange, the holder, or his authorised agent <sup>1</sup>, must present it to the drawee for payment at the time when due; and when no time is expressed, within a reasonable period after receipt of the bill <sup>2</sup>; or otherwise the drawer and indorsers will be exonerated from their liability. And it has been held that even the bankruptcy, insolvency, or death of the acceptor will not excuse a neglect to make presentment. In the first case presentment should be made to the bankrupt or his assignees; and in the latter to the personal representative of the deceased, or, in case there should not be a personal representative, at the house of the deceased <sup>3</sup>. Neither will the insufficiency of the bill in any respect excuse the omission of presentment <sup>4</sup>.

But by the custom of merchants recognised by law, a bill drawn payable at usance, or at a certain time after date or sight <sup>5</sup>, or after demand, is not payable on the day of its becoming due; a further time of three days is allowed, called days of grace. In the case of foreign bills, if payment is not made on the last of the three days before the hours of business are expired <sup>6</sup>, a protest should immediately be made, so as to be sent, if possible, by post on that day. But as to inland bills, it seems that the acceptor has the whole of the third day of grace for payment without regard to banking hours; and therefore notice of non-

<sup>1</sup> *Coore v. Callaway*, 1 Esp. N. P. C. 115.

<sup>2</sup> *Cowley v. Dunlop*, 7 T. R. 581.

<sup>3</sup> *Esdaille v. Sowerby*, 11 East's Rep. 117.

<sup>4</sup> *Chamberlyn v. Delarive*, 2 Wils. 353.

<sup>5</sup> When bills are made payable at one, two, or more months after date, the computation of the time when they will become due must be by calendar months. (Beawes, pl. 253.) And when a bill is payable a certain number of days after sight, the days are computed from the day the bill was accepted, exclusively thereof. (*Campbell v. French*, 6 T. R. 212.)

<sup>6</sup> *Parker v. Gordon*, 7 East's Rep. 385.

payment need not be given before the following morning <sup>1</sup>. For it has been held, that if a second presentment be made after banking hours on the last day of grace, and the acceptor offers to pay the bill on such second presentment, he is not liable for the fees of noting or protesting <sup>2</sup>. If however, by the known custom of any particular place, bills are payable only within limited hours, or at any particular place, a presentment out of those hours, or not at that place, would be invalid <sup>3</sup>. So if a bill is payable at a banker's, presentment after the usual hours of business, viz. five o'clock, will release the drawer and indorsers from their liability <sup>4</sup>.

But as the contract of the acceptor is absolute, he is primarily liable, and cannot in general take advantage of non-presentment of a bill at the precise time when due <sup>5</sup>; unless he has, by his acceptance, undertaken to pay within a certain period after demand, and then he may insist on the want of presentment <sup>6</sup>. So, if he appoints payment to be made at his banker's, if he is really prejudiced, as if the banker fails, having property belonging to the acceptor in his hands, he will be discharged from his liability, if the bill has not been properly presented at such banker's <sup>7</sup>.

Whether a presentment to the acceptor is first necessary, before an action is commenced against him for the dishonour of a bill, the courts of King's Bench and Common Pleas adopt different rules. In the court of King's Bench, it has been held, that where a bill of exchange or promissory note is made payable at a banker's or any other particular place, there is no necessity for presentment to the acceptor

<sup>1</sup> *Leftley v. Mills*, 4 T. R. 170. *Haynes v. Birks*, 3 Bos. and Pul. 602.

<sup>2</sup> 4 T. R. 170.

<sup>3</sup> *Parker v. Gordon*, 7 East's Rep. 385. *Saunderson v. Judge*, 2 Hen. BL 509.

<sup>4</sup> *Ibid.* *Barclay v. Bailey*, 2 Camp. N. P. C. 527. *Jameson v. Swinton*, 2 Taunt. 224.

<sup>5</sup> *Dingwall v. Dunster*, Doug. 247.

<sup>6</sup> *The Duke of Norfolk v. Howard*, 2 Show. 235.

<sup>7</sup> *Bishop v. Chitty*, 2 Str. 1195.

of a bill or the maker of a note for payment before the commencement of the action, the bringing of the action being a sufficient demand <sup>1</sup>. But in the court of Common Pleas, a presentment is required to be made to them before an action can be commenced against them <sup>2</sup>.

The causes which excuse a neglect to present for payment being the same as those which do away a neglect to present for acceptance, it would be repetition to mention them in this place: we therefore refer the reader to that head.

If the political state of the country where the bill is due, renders a presentment for payment in due time impossible, presentment as soon as it is practicable will entitle the holder to recover <sup>3</sup>.

In all cases of bills of exchange, &c. whether foreign or inland, if the last day of grace falls on a Sunday, Christmas-day, or Good Friday, the holder ought to demand payment on the second day, and, if it is not then paid, treat the bill as dishonoured <sup>4</sup>.

In the case of bank post bills <sup>5</sup>, bills payable on demand, or when no time of payment is expressed <sup>6</sup>, no days of grace are allowed, but they are payable instantly on presentment. Bills payable at sight seem entitled to the allowance of the usual days of grace <sup>7</sup>. On bills payable to the excise, six days beyond the three days of grace are allowed, if required by the acceptor.

The number of the days of grace allowed on a bill of exchange varies according to the custom of different countries, and is computed according to the law of the country where the bill becomes due.

<sup>1</sup> Nicholls v. Bowes, 2 Camp. N. P. C. 498. Fenton v. Goundry, Ibid. 656. Lyon v. Sundius, 1 Ibid. 423.

<sup>2</sup> Callingham v. Aylett, 2 Ibid. 549.

<sup>3</sup> Patience v. Townly, 2 Smith's Rep. 225.

<sup>4</sup> Mar. 95.

<sup>5</sup> Lovell v. 247.

<sup>6</sup> Chitty, 222.

<sup>7</sup> Dehors v. Harriot, 1 Show. 163. Coleman v. Sayer, Barnard, 303.

In the dominions of Great Britain, Bergamo, and Vienna, three days are allowed; at Frankfort, out of the fair time, four; at Leipsick, Naunberg, and Augsburgh, five; at Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologne, Breslau, Nuremburg, Lisbon, and Portugal, six; at Naples, eight; at Dantzic, Koningsburg, and France, ten; at Hamburgh and Stockholm, twelve; in Spain, fourteen; at Rome, fifteen; at Genoa, thirty. At Leghorn, Milan, and some other places in Italy, there is no fixed time<sup>1</sup>. Sundays and holidays are always included in these days of grace in Great Britain, Ireland, France, Naples, Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzic, and Koningsburg; but not so at Venice, Cologne, Breslau, and Nuremburg. At Hamburgh, and in France, the day on which the bill falls due makes one of the days of grace; but no where else<sup>2</sup>.

Instead of an express limitation by months or days, foreign bills are usually drawn payable at one, two, or more usances; a term which signifies the time which it is the usage of the countries between which the bills are drawn to appoint for payment. Double or treble usance is double or treble the usual time; an half usance is half that time, and consists of fifteen days notwithstanding the inequality of the length of the months<sup>3</sup>.

Usance between London and any part of France is thirty days after the date of the bill. Between London and the following places, viz. Hamburgh, Amsterdam, Rotterdam, Middleburg, Antwerp, Brabant, Zealand, and Flanders, one calendar month. Between London and Spain and Portugal, two calendar months. Between London and Genoa, Leghorn, Milan, Venice, and Rome, three calendar months. The usance of Amsterdam on Italy, Spain, and Portugal,

<sup>1</sup> Kyd, 9 Beawes, pl. 260. Poth pl. 139.

<sup>2</sup> Beawes, pl. 474.

<sup>3</sup> Poth, pl. 15. Mar. 93.

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is two months. On France, Flanders, Brabant, and on any place in Holland or Zealand, is one month. On Frankfort, Nuremberg, Vienna, and other places in Germany, on Hamburgh, and Breslau, fourteen days after sight<sup>1</sup>.

As usances vary according to the custom of different countries, it is always necessary that the usance should be particularly described; for where the plaintiff declared on a bill of exchange drawn at Amsterdam, payable at London, at two usances, and did not show what the two usances were; judgement was given for the defendant, because the court could not take notice of foreign usances, which vary, being longer in one particular place than in another, unless the usance of that particular country had been shown and proved<sup>2</sup>.

The conduct the holder of a bill is to pursue, in case he cannot find the drawee so as to make a presentment, is so very similar to that which he is to adopt when he cannot find the drawee so as to obtain acceptance, that it is sufficient to refer to that head.

#### 12. *Of Payment.*

Payment should be made only to the holder of the bill, or some person properly authorised by him<sup>3</sup>. In case of the death of the holder, payment should not be made to his personal representative, unless he has power to administer to his effects<sup>4</sup>. Neither ought payment to be made of a bill or check before it is due; for where a check which had been lost by the payee was paid by a banker the day before it bore date, he was held liable to repay the amount to the loser<sup>5</sup>. So payment of a lost bill, transferable only by in-

<sup>1</sup> Ked. 4. Beawes, nl. 259. Poth. pl. 15.

<sup>2</sup> Buckley v. Campbell, 1 Salk. 132.

<sup>3</sup> Favenc v. Bennett, 11 East's Rep. 40.

<sup>4</sup> Poth. pl. 166.

<sup>5</sup> Da Silva v. Fuller, London Sitings, Easter, 1776. Selw. Ca. 283. MSS.

dorsement,



dorsement, but not indorsed to a bonâ fide holder, is not protected; but the loser may compel the payee to repay the amount<sup>1</sup>. But payment of a lost bill or note, transferable by mere delivery, or indorsed in blank, to the person finding or stealing it, will discharge the drawee from paying it over again to the loser, if he has no knowledge of such loss or robbery<sup>2</sup>; and although he has notice of the loss or robbery, yet payment to a holder for a sufficient consideration will be protected; and the original holder who lost the bill will consequently forfeit all right of action against the drawee<sup>3</sup>.

Payment of a bill to a trader or his order, after a secret act of bankruptcy, is, by virtue of the statute 1 Jac. I. c. 15. s. 14. effectual, and discharges the person making it, provided that the party had not notice at the time of the transaction of such act of bankruptcy, or that the bankrupt had stopped payment or was insolvent, and provided also that such payment be made more than two calendar months before the issuing of the commission<sup>4</sup>. So if a bankrupt from the importunity of his creditor, or from fear of a prosecution, has indorsed a bill or note to him, although at the time he had an act of bankruptcy in contemplation, a payment of such indorsement will be protected<sup>5</sup>. And payment of an acceptance given by a debtor not having notice that his creditor had committed a secret act of bankruptcy, is by virtue of the statute 1 Jac. I. valid, although between the time of acceptance and payment notice of the bankruptcy came to the debtor's knowledge<sup>6</sup>.

So payment *by* a trader, after a secret act of bankruptcy,

<sup>1</sup> Mead v. Young, 4 T. R. 28.

<sup>2</sup> Sir John Lawson v. Weston, 4 Esp. N. P. C. 56.

<sup>3</sup> Good v. Coe, cited in Boehm v. Stirling, 7 T. R. 427.

<sup>4</sup> 46 Geo. III. c. 135, s. 112. Tamplin v. Diggins, 2 Camp. N. P. C. 312.

<sup>5</sup> Crosby v. Crouch, 11 East's Rep. 256. Bailey v. Ballard, 1 Camp. N. P. C. 416.

<sup>6</sup> Wilkins v. Casey, 7 T. R. 711.

is protected by the statute 19 Geo. II. c. 32. provided such payment be made to a bona fide creditor not having notice of such act of bankruptcy at the time of the transaction, and that it be made by virtue of the 45th Geo. III. c. 135. s. 112. more than two calendar months before the issuing of the commission.

In case of the bankruptcy of a factor or banker, bills remitted to them and entered short while unpaid, being considered in the nature of a deposit, must be returned by the assignees to the owner, subject to such lien as the factor or banker may have on them<sup>1</sup>; and if payment be received upon such bills by the assignees, they must refund it to the owner.

The holder of a bill of exchange may receive part payment from the acceptor or indorser, and sue the other parties for the residue, provided he does not give time to such acceptor or indorser to pay the residue<sup>2</sup>.

But if when a bill becomes due the holder compounds with the acceptor<sup>3</sup>, or gives time to him<sup>4</sup>, or releases him when he has taken him into custody<sup>5</sup>, or takes a fresh security<sup>6</sup>, by which further time is given<sup>7</sup>, or a new acceptance<sup>8</sup>, without the concurrence of all the other parties to the bill, he thereby discharges them from all responsibility, although the holder may have given due notice of the dishonour. For though the holder may forbear to sue the acceptor or any other party as long as he chooses, he cannot agree to give time or a new credit to the acceptor without the assent of the other parties<sup>9</sup>. And therefore where the

<sup>1</sup> Zinck v. Walker, 2 Bl. Rep. 1154. Giles v. Perkins, 9 East's Rep. 12.

<sup>2</sup> Gould v. Robson, 8 East's Rep. 580.

<sup>3</sup> Ex parte Wilson, 11 Ves. Jun. 410.

<sup>4</sup> Clark v. Devlin, 3 Bos. and Pul. 365.

<sup>5</sup> Ex parte Wilson, 11 Ves. Jun. 410.

<sup>6</sup> The King v. the Sheriff of Surry, 1 Taunt. 159.

<sup>7</sup> Claxton v. Swift, 3 Mod. 87.

<sup>8</sup> Gould v. Robson, 8 East's Rep. 580.

<sup>9</sup> Per Lord Eldon, in Wright v. Simpson, 6 Ves. Jun. 734.

defendant

defendant lent his indorsement on a promissory note to the drawer, which note was payable on demand, for the purpose of enabling him to raise money on that security from the plaintiffs, his bankers, who agreed to make advances thereon; it was held that the bankers, who had renewed their advances at the end of the six months, without the knowledge or consent of the defendant, could not recover upon the note thus indorsed by him, without proof of a demand on the drawer, and regular notice of the dishonour to the defendant<sup>1</sup>.

Similar indulgence to a drawer or prior indorser will also discharge all subsequent parties<sup>2</sup>.

But though the giving time to, or taking a fresh security from, an acceptor, indorser or drawer, will in general discharge all subsequent parties who would be entitled to resort to the party indulged, yet such subsequent parties will not be discharged by the holder's granting the above indulgences, if they had no effects in the hands of the party to whom the indulgence was given<sup>3</sup>; or that the drawer, &c. had given his assent to the fresh security being taken from the acceptor<sup>4</sup>; or that no further time was given by such fresh security<sup>5</sup>.

If a bill of exchange is remitted by the post, if this is the customary mode of remittance, or has been done by the express direction of the creditor, it will amount to payment of the debt, and discharge the debtor<sup>6</sup>; provided the letter containing the bill has been put into the General Post Office in Lombard-street, or a receiving house appointed by

<sup>1</sup> *Smith v. Becket*, 13 East's Rep. 187.

<sup>2</sup> *Gould v. Robson*, 8 East's Rep. 580.

<sup>3</sup> 1 Bos. and Pul. 652. 8 East's Rep. 576.

<sup>4</sup> *Clarke v. Devlin*, 3 Bos. and Pul. 363. *Withall v. Masterman*, 2 Camp. N. P. C. 179.

<sup>5</sup> *Avrey v. Davenport*, 2 New Rep. 474.

<sup>6</sup> *Warwick v. Noakes*, Peake's N. P. C. 67.

that office; but a delivery to a bellman in the street will not have that effect<sup>1</sup>.

Payment of a bill, whether foreign or inland, being refused, any third person not party to the bill may pay it for the honour of the drawer or any of the indorsers; and he thereby acquires all the same rights that the holder of the bill had, although no regular transfer of the bill was made to him<sup>2</sup>. This payment, as it is always made after protest for non-payment, and in prudence should not be made before<sup>3</sup>, is called payment *supra protest*. But the acceptor, if he has previously made a simple acceptance, cannot pay in honour of an indorser unless he has made such acceptance without having effects of the drawer in his hands; because he is already bound as acceptor<sup>4</sup>. If the acceptor *supra protest* for the honour of the drawer or indorser receives his approbation of the acceptance, he may pay the bill without any protest for non-payment<sup>5</sup>.

In all cases on payment of a bill or note, a receipt should be written upon the back of the bill. This receipt is demandable by virtue of the act 46 Geo. III. c. 126. s. 5. and should state by whom the payment has been made<sup>6</sup>. If part only has been paid the same should be acknowledged upon the bill, or the party paying may be liable to pay the amount over again to a *bonâ fide* indorsee<sup>7</sup>.

If a promissory note of twenty years date be unaccounted for, it affords a presumption of payment unless the contrary appears<sup>8</sup>.

<sup>1</sup> *Hawkins v. Rutt*, Peake's N. P. C. 186.

<sup>2</sup> *Mertens v. Winnington*, 1 Esp. N. P. C. 112.

<sup>4</sup> *Ibid.* pl. 51.

<sup>6</sup> *Scholey v. Walsby*, Peake's N. P. C. 25.

<sup>7</sup> *Cooper v. Davies*, 1 Esp. N. P. C. 463.

<sup>8</sup> *Duffield v. Creed*, 5 *Ibid.* 52.

<sup>3</sup> *Beawes*, pl. 50.

<sup>5</sup> *Ibid.*

13. *Of the Dishonour of a Bill by Non-acceptance or Non-payment ; and Notice thereof.*

If a bill is presented, and an acceptance is refused, or only a qualified acceptance offered, or any other default made, after noting or protest, immediate notice must be given to all the parties to whom the holder means to resort for payment ; or they will be discharged from their respective liabilities<sup>1</sup> ; unless the holder can prove that the party insisting on the want of notice has not sustained any damage by the omission of it, as that he had no effects in the hands of the drawee, or that he had given no consideration for the bill ; or he must give in evidence such facts as will throw the onus probandi the actual damage on the defendant<sup>2</sup>.

So if, on presentment of a bill, the drawee refuses to pay the amount, or makes default of payment, in case the bill is foreign it is incumbent on the holder to protest it, and whether foreign or inland to use due diligence in giving immediate notice of the dishonour to those parties to whom he means to resort for payment, or they will be discharged from their respective obligations<sup>3</sup>.

The rule which requires notice to be given within a reasonable time by the holder of a bill of exchange to the drawer, of the drawee's refusal to accept, is calculated for the benefit of the drawer, to enable him to withdraw his effects out of the hands of the drawee.

But though the neglect on the part of the holder to give immediate notice of the dishonour of a bill, discharges the parties entitled to insist on the want of it from their respective liabilities ; yet the consequences of such a neglect may

<sup>1</sup> *Roscoe v. Hardy*, 12 East's Rep. 431.

<sup>2</sup> *De Berdt v. Atkinson*, 2 Hen. Bl. 336. *Eickerdike v. Bollman*, 1 T. R. 406.

<sup>3</sup> *Gale v. Walsh*, 5 T. R. 239.



be done away by other circumstances. The absconding or absence of the drawer or indorser may excuse the neglect to advise him<sup>1</sup>; and the sudden illness or death of the holder, or of his agent, will dispense with notice to any of the parties; provided it has been given as soon as possible after the impediment was removed<sup>2</sup>. It has also been held, that a payment of part, without objection to the want of notice, will dispense with proof of notice, and in the case of a foreign bill also of protest for non-payment<sup>3</sup>. A promise to pay the whole, or to see it paid, or an acknowledgement that it must be paid, made by the person insisting on the want of notice, amounts to a waiver of the consequence of the laches, and admits the holder's right to action<sup>4</sup>. So if the day on which the notice should be given is a public festival<sup>5</sup>, or that the holder is unacquainted with the indorser's place of residence<sup>6</sup>, an omission to give notice of the dishonour of a bill is dispensed with. But the death, bankruptcy, insolvency of the acceptor, or his being in prison<sup>7</sup>, or the insolvency or bankruptcy of both the drawer and acceptor, will not dispense with the necessity of notice of the dishonour of a bill, although those facts are fully known to the parties<sup>8</sup>. Neither will the mere offer of the drawer or indorser, after arrest, to give a bill by way of compromise for the sum demanded, without acknowledging his liability, dispense with the necessity of proving notice<sup>9</sup>. Nor will the giving of a second bill as security for the payment of a bill overdue and dishonoured, discharge the holder from giving notice

<sup>1</sup> *Walwyn v. St. Quintin*, 2 Esp. N. P. C. 516.

<sup>2</sup> *Hilton v. Shepherd*, 6 East's Rep. 16.

<sup>3</sup> *Taylor v. Jones*, 2 Camp. N. P. C. 105.

<sup>4</sup> *Chitty*, 192.

<sup>5</sup> *Lindo v. Unsworth*, 2 Camp. N. P. C. 602.

<sup>6</sup> *Bateman v. Joseph*, 12 East's Rep. 433.

<sup>7</sup> *Ex parte Wilson*, 11 Ves. Jun. 412. *Whitfield v. Savage*, 2 Bos. and Pal. 279. *Haynes v. Birks*, 3 *Ibid.* 601.

<sup>8</sup> *Nicholson v. Gouthit*, 2 Hen. Bl. 612. *Esdaile v. Sowerby*, 11 East's Rep. 114.

<sup>9</sup> *Cumming v. French*, 2 Camp. 106.

of the dishonour of the second : by the holder's laches, the drawee is discharged from all liability on both bills <sup>1</sup>. Nor is the holder of a bill excused from giving notice of the dishonour where a drawer has effects in the hands of the drawee, although the drawee may have appropriated such effects to the satisfaction of his own debt <sup>2</sup>. Nor is a notice dispensed with where the drawer has no effects in the hands of the drawee at the time of drawing the bill, if he has consigned effects to him to answer the bill <sup>3</sup>. So if the drawer has effects in the hands of the drawee at the time of drawing the bill, though it does not appear to what amount, and though such effects are withdrawn before the bill can be presented, the circumstance of there not being effects in the hands of the drawee at the time when the bill is presented for acceptance, and refused, will not supersede the necessity of notice ; for it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary <sup>4</sup>. In *Walwyn v. St. Quintin* <sup>5</sup>, Eyre C. J. said, “ Perhaps, indeed, notice ought never to be dispensed with, since it is a part of the same custom of merchants which creates the duty ; especially as the grounds for dispensing with it are such as cannot influence the conduct of the holder of the bill at the time when he is to determine whether he will or will not give notice ; for ninety-nine times in a hundred he cannot know whether the drawer have or have not effects in the hands of the acceptor, or of him for whose accommodation the bill was drawn. It has, however, been resolved in many cases, that where the drawer has had no effects in the hands of the acceptor, notice might be dispensed with. But it may be proper to caution bill-

<sup>1</sup> *Bridges v. Berry*, 3 Taunt. 130.

<sup>2</sup> *Blackan v. Doren*, 2 Camp. N. P. C. 503.

<sup>3</sup> *Legge v. Thorpe*, 12 East's Rep. 175.

<sup>4</sup> *Orr v. Maginnis*, 7 East's Rep. 359.

<sup>5</sup> 1 Bos. and Pul. 652.

holders not to rely on it as a general rule, that if the drawer have no effects in the acceptor's hands notice is not necessary; the cases of acceptances on the faith of consignments from the drawer not come to hand, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions, and there may possibly be many others.

But though the want of effects in the drawee at the time of drawing the bill will supersede the necessity of notice of the dishonour of the bill to the drawer, yet the omission of giving such notice to *bonâ fide* indorsers is not excused because the acceptor had no effects of the drawer in his hands<sup>1</sup>.

If the party entitled to notice be a bankrupt, notice of the dishonour should be given to him or his assignees; if dead, to his executor or administrator<sup>2</sup>; if he has absconded, that circumstance will excuse the not making of any further inquiries<sup>3</sup>; if abroad, a demand at his residence, or of his agent in this country, will be sufficient<sup>4</sup>. Where the holder is ignorant of the place of residence of the party entitled to notice, if he uses reasonable diligence to discover it, it will be sufficient<sup>5</sup>.

What is to be deemed due diligence in giving notice of the dishonour of a bill is a question of law dependent upon facts, viz. the situation of the parties, the distance at which they live, and the facility of communication between them<sup>6</sup>. In case of a foreign bill notice should be given on the day of the refusal to accept, if any post or ordinary conveyance sets out on that day<sup>7</sup>; and if not, by the next ordinary conveyance.

<sup>1</sup> *Wilkes v. Jacks*, Peake's N. P. C. 202.

<sup>2</sup> *Cooke's Bank*. Laws, 178.

<sup>3</sup> *Lord Raym.* 743.

<sup>4</sup> *Cromwell v. Hynson*, 2 Esp. N. P. C. 511.

<sup>5</sup> *Bateman v. Joseph*, 12 East's Rep. 433. *Sturges v. Derrick*, *Wightwick's Rep.* 76.

<sup>6</sup> *Darbishire v. Parker*, 6 East's Rep. 3.

<sup>7</sup> *Leftley v. Mills*, 4 T. R. 174.

Thus,

Thus, in *Muilman v. D'Eguino*<sup>1</sup>, which was the case of a foreign bill of exchange drawn in the East Indies, a certain time after sight; it was held that it was not necessary to send notice of the dishonour by an accidental foreign ship which sailed from thence not direct for England, but that it was sufficient to have sent notice by the first regular English ship which sailed for England.

In regard to the precise time when notice of the dishonour of inland bills should be given, there is no settled rule. It is however certain, that it is in no case necessary in inland bills to give such notice on the day of refusal<sup>2</sup>. The general rule, as may be collected from *Tindal v. Brown*<sup>3</sup> and other cases, seems to be, with respect to persons living in the same town, that the notice shall be sent by the post sufficiently early in the morning after the day on which the bill has been dishonoured, or on which the party himself has received the notice, that the person to whom the letter containing the notice is addressed, may receive the letter on that day<sup>4</sup>. But where parties live in different places, it will be sufficient that each party gives notice to his immediate indorser by the next practicable post after he has himself received notice<sup>5</sup>. And if in any particular place the post should go out so early after the receipt of the intelligence, as that it would be inconvenient to send notice by the next post, then, with respect to a case so circumstanced, if notice is sent by the second post it will be valid<sup>6</sup>. If the parties live in London or within the limits of the twopenny post, the time of sending notice of the dishonour of a bill is to be regulated by the directions given in the first case; but if they

<sup>1</sup> 2 Hen. Bl. 565.

<sup>2</sup> *Russel v. Langstaffe*, Doug. 515. *Muilman v. D'Eguino*, 2 Hen. Bl. 565.

<sup>3</sup> 1 T. R. 167.

<sup>4</sup> *Marsh v. Maxwell*, 2 Camp. N. P. C. *Jameson v. Swinton*, Ibid. 374. *Smith v. Mullet*, Ibid. 208. *Hilton v. Fairclough*, Ibid. 633.

<sup>5</sup> *Darbishire v. Parker*, 6 East's Rep. 3.

<sup>6</sup> Per Mr. Justice Lawrence, Ibid.

reside out of London, then notice by the next practicable post after the party has received notice himself will suffice.

In *Haynes v. Birks*<sup>1</sup>, where the bill, which was put by the plaintiff in the hands of his banker to present for payment, having been dishonoured in London about two o'clock on Saturday, and presented again at nine in the evening, by a notary, and notice given of the dishonour to the plaintiff on Monday at Knightsbridge, who gave notice to the indorser of it by letter on Monday at noon, which letter the indorser received on Tuesday at noon in Tottenham-court road; it was held that this notice was sufficient to entitle the holder to recover against the indorser. For though a banker is bound to give notice to his principal on the very day on which the bill is dishonoured, it was impossible in this case for the bankers to give effectual notice before the Monday, the bill not having been presented by the notary until between nine and ten o'clock on Saturday night.

So where the indorsee of a bill of exchange placed it in the hands of his bankers, who returned it the day after its being dishonoured to the indorsee; it was held that notice given to the drawer (the defendant) by the indorsee (the plaintiff) on the day after the receipt of the dishonour was sufficient; for a banker is not obliged to give notice of the dishonour to any one but his customer; neither is a holder, on return of a bill dishonoured, bound *omissis omnibus aliis negotiis* to devote himself immediately to giving notice<sup>2</sup>.

Where there are several indorsements, and the holder gives notice of the dishonour to his indorser, each successive indorser must on receipt of the notice give a fresh notice to the party liable over to him, so that such notice may be received on the day after that on which the party giving the notice was informed of the dishonour of the bill<sup>3</sup>. And

<sup>1</sup> 2 Bos. and Pul. 559.

<sup>2</sup> *Scott v. Lifford*, 9 East's Rep. 347.

<sup>3</sup> *Smith v. Mullett*, 2 Camp. N. P. C. 208.

therefore



therefore where a fourth indorser, having received notice of the dishonour of the bill from his indorsee on the 20th of the month, did not send notice to his immediate indorser until so late in the evening of the 21st that it was not delivered to the defendant (the first indorsee) till the morning of the 23d, it was held that by this neglect the plaintiff had discharged all the prior indorsers, although in the course of the 22d notice of the dishonour was given both to the second indorsee and to the defendant<sup>1</sup>.

Where it is necessary to give notice of the dishonour of a bill to a banker, the notice should be given during the hours of business<sup>2</sup>.

With respect to the mode of sending notice of the dishonour of a bill, it seems that in the case of either a foreign or inland bill, sending notice by the post will be sufficient, however near the residence of the parties may be to each other, or even though the letter containing such notice should miscarry<sup>3</sup>. But where it is necessary or more convenient for the indorsee to send notice by any other conveyance than the post, he may do so, and charge for the same<sup>4</sup>. And in all cases where notice is sent from London by the general post, the letter containing the notice should be delivered at the General Post Office in Lombard-street, or at least at a receiving-house appointed by that office; for a delivery to the bellman in the street will be insufficient<sup>5</sup>.

As to the party by whom the notice should be given, it appears that in general the notice of non-acceptance or non-payment should come from the holder, or from some person authorized by him<sup>6</sup>. However, if a drawer or indorser receives due notice of the dishonour of a bill, from any per-

<sup>1</sup> *Smith v. Mullett*, 2 Camp. N. P. C. 208. *Marsh v. Maxwell*, *Ibid.* 210.

<sup>2</sup> *Barclay v. Bayley*, *Ibid.* 527.

<sup>3</sup> 5 Esp. N. P. C. 157. 3 Bos. and Pul. 599.

<sup>4</sup> *Pearson v. Crallan*, 2 Smith's Rep. 404.

<sup>5</sup> *Hawkins v. Rutt*, Peake's N. P. C. 186.

<sup>6</sup> *Stewart v. Kennet*, 2 Camp. N. P. C. 177.

son who has a right of action on the bill, it is not necessary that he should receive a notice from a subsequent indorser<sup>1</sup>.

When a bill is dishonoured, the only expense the holder or other party can demand is the charge for noting and protesting it, notwithstanding any very extraordinary loss he may have been put to by travelling, &c. if not necessarily incidental<sup>2</sup>. Re-exchange, postage, commission, and provision, are other charges to which the parties to a bill are subject. Re-exchange is the expense incurred by the bill being dishonoured in a foreign country, where it was payable, and returned to that in which it was made or indorsed, and there taken up: the amount of it is regulated by the course of the exchange between the countries through which the bill has been negotiated<sup>3</sup>.

But the liability to pay re-exchange does not extend to the acceptor of a bill; he is only liable for the principal sum, together with interest, according to the legal rate of the interest where the bill is payable<sup>4</sup>.

#### 14. *Of the Protest of a Bill.*

If on presentment of a bill for acceptance or payment, the drawee refuse to pay or accept, (as the case may be,) it is incumbent on the holder, or, if he be ill or absent, on some other person for him, if the bill is foreign, immediately to protest it, and whether foreign or inland to give notice of the dishonour to all those parties to whom he means to resort for payment<sup>5</sup>; the neglect to do which can only be excused by proof that the drawer had no effects in the hands of the drawee from the time of drawing the bill to the

<sup>1</sup> Jameson v. Swinton, 2 Camp. N. P. C. 573.

<sup>2</sup> Cullen's Bank. Laws, 102.

<sup>3</sup> Auriol v. Thomas, 2 T. R. 52.

<sup>4</sup> Woolsey v. Crawford, 2 Camp. 445.

<sup>5</sup> Rogers v. Stephens, 2 T. R. 713. Gale v. Walsh, 5 Ibid. 239.

time of the non-acceptance or non-payment, as the case may be <sup>1</sup>.

In foreign bills certain formalities are required: if the person to whom the bill is addressed, on presentment, will not accept or pay it, (as the case may be,) the holder is to carry it to a notary public, who (on the same day, viz. the last day of grace<sup>2</sup>;) is to present it again to the drawee, and demand acceptance or payment; which if refused, he is to make a minute upon the bill itself, consisting of his initials, the month, the day, and the year, together with his charges for the same. He must afterwards draw up a protest, signifying that the bill has been presented for acceptance or payment, which was refused, and that the holder intends to recover all damages which he or any other party to the bill may sustain on account of the dishonour<sup>3</sup>. If, however, no public notary should be at the place where the bill is dishonoured, the protest may be executed by any substantial person of that place in the presence of two or more credible witnesses.

In the case of foreign bills, the protest is by the custom of merchants indispensably necessary. The noting which constitutes the minute above mentioned is unknown in the law, and is merely a preliminary step to the protest, the want of which it will not in any case supply <sup>4</sup>.

The protest must be written upon a proper stamp <sup>5</sup>, and be made within the regular hours of business <sup>6</sup>, on the day on which the bill is dishonoured <sup>7</sup>; the neglect to do which can only be excused by the illness of the holder, or circumstances of a like nature <sup>8</sup>. In practice, however, if the bill is noted on the day of its dishonour, the protest

<sup>1</sup> *Orr v. Maginnis*, 7 East's Rep. 359.

<sup>2</sup> *Tassel v. Lee*, 1 *Ld. Raym.* 743.

<sup>3</sup> *Mar.* 16.

<sup>4</sup> 4 *T. R.* 175.

<sup>5</sup> 41 *Geo. III.* c. 98.

42 *Geo. III.* c. 49.

<sup>6</sup> *Mar.* 112.

<sup>7</sup> *Leftley v. Mills*, 4 *T. R.* 175.

<sup>8</sup> *Poth.* pl. 144.

may be drawn up any day afterwards, and bear the date of the day on which the noting was made<sup>1</sup>.

In the case of inland bills, the protest for non-payment, or non-acceptance, is by no means necessary<sup>2</sup>; and the omission of it will not, if due notice of the dishonour has been given, affect the holder's right to the principal sum, as it would in the case of a foreign bill of exchange<sup>3</sup>: the only benefit arising from it, is to entitle the holder to the accumulative advantage of interest, damages, and costs<sup>4</sup>; to claim which, the holder must by the fifth section of 3 and 4 Anne, c. 9. send the protest or notice thereof within fourteen days after the same has been made. If the bill is under the amount of twenty pounds, by the statute 9 and 10 Wil. III. c. 17. s. 6. it appears that the holder will be entitled to the accumulative remedy, though no protest is made.

Besides the protest for non-acceptance, and non-payment, there may also be a protest for better security. This is usual when the drawee absconds or becomes insolvent before the bill is due, or when the holder has any reason to suppose it will not be paid<sup>5</sup>. But though the holder is entitled to make this protest, the drawer or indorsers are not compellable to give this security; and therefore, before the holder can sue them, he must wait until the bill becomes due<sup>6</sup>.

If the drawee does not choose to accept on the account of him in whose favour the bill is drawn, he may accept it *supra* protest, which is called an acceptance for the honour of the person on whose behalf it is made<sup>7</sup>. And if the drawee refuses to accept the bill, or absconds, or is incapa-

<sup>1</sup> *Chaters v. Bell*, 4 Esp. N. P. C. 48.

<sup>2</sup> If an inland bill is protested, it must not be done till the day after the third day of grace. (*Leftley v. Mills*, 4 T. R. 170.)

<sup>3</sup> *Brough v. Parkins*, *Ld. Raym.* 993.

<sup>4</sup> *Boulager v. Talleyrand*, 2 Esp. N. P. C. 550.

<sup>5</sup> *Kyd*, 159.

<sup>6</sup> *Beawes*, pl. 22. 26.

<sup>7</sup> *Beawes*, pl. 34.

ble of making a contract, any other person may, without the consent of the drawer or indorsers, accept it for the honour of the bill, or of the drawer, or of any particular indorser<sup>1</sup>; and he thereby acquires a right of action against all those parties for whom he pays such acceptance<sup>2</sup>.

15. *Of Promissory Notes, Bank Notes, Bankers' Notes, and Checks or Drafts on Bankers.*

*Promissory Notes*<sup>3</sup>.

A promissory note may be defined to be a written promise to pay a sum specified at a time therein limited, or on demand to a person therein named, or his order, or to the bearer.

The validity of these notes having been much questioned, as they were considered only as a written evidence of the debt, and not assignable or indorsable over, within the custom of merchants, to any other person, by him to whom they were made payable; and that if they had been indorsed or assigned over, the person to whom they were indorsed or assigned could not maintain an action, within the custom, against the person who drew and subscribed the note; and that within the same custom, even the person to whom it was made payable could not maintain such action<sup>4</sup>; it was, for the purpose of encouraging trade and commerce, enacted by the statutes 3 and 4 Anne, c. 9. s. 1. (made perpetual by the 7th Anne, c. 25. s. 3.) “ That all notes in writing, made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, usually intrusted by them to sign such notes for them, whereby

<sup>1</sup> Beawes, pl. 38. Mar. 125.

<sup>2</sup> Mertens v. Winnington, 1 Esp. N. P. C. 112.

<sup>3</sup> The indorser of a note corresponds to the drawer of a bill; the maker to the drawee or acceptor; and the indorsee to the payee, or party to whom the bill is made payable. (Per Lord Mansfield, in Heylin v. Adamson, 1 Bur. 676.)

<sup>4</sup> Clerke v. Martin, 2 Ld. Raym. 758. Buller v. Crips, 6 Mod. 29.



such person, &c. or their servant or agent, promise to pay to any other person or persons, body politic and corporate, or order, or bearer, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c. to whom the same is made payable; and also such note, payable to any person, &c. or order, shall be assignable or indorseable over in the same manner as inland bills of exchange are, or may be, by the custom of merchants; and that the person, &c. to whom the money is payable, may maintain an action for the same in such manner as he might do upon any inland bill of exchange made according to the custom of merchants; and that the person, &c. to whom such note is indorsed or assigned, may maintain an action, either against the person, &c. who or whose servant or agent signed such note, or against any of the persons who indorsed the same, as in cases of inland bills of exchange; and that the plaintiff shall recover damages and costs of suit; and in case of nonsuit or verdict against the plaintiff, the defendant shall recover costs.”

By this statute, promissory notes are placed upon the same footing as bills of exchange, and consequently have a similar effect with them, the decisions and rules relating to the one being in general applicable to the other<sup>1</sup>. And therefore, when a promissory note is payable at a stated time, days of grace are allowable<sup>2</sup>.

No particular words are essential to the validity of this kind of instrument; any order or promise, which from the time of making it cannot be complied with or performed without the payment of money, will, as was said before, have that effect<sup>3</sup>. Neither is it necessary that it should contain any words rendering it negotiable<sup>4</sup>. A note merely promising to account with another, or to his order, is suffi-

<sup>1</sup> *Brown v. Harradin*, 4 T. R. 152.

<sup>2</sup> *Colehan v. Cooke*, Willes, 396.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Smith v. Kendal*, 6 T. R. 23.

ciently valid, though it contains no formal promise to pay<sup>1</sup>. To render such notes valid, however, they must be made payable at all events, and not dependent on a contingency for payment. They must not be payable out of a particular fund; and, to be valid, must be for the payment of money only, and not for the payment of money and performance of some other act, or in the alternative<sup>2</sup>.

But the mere acknowledgement of a debt cannot amount to a promissory note, unless there appear some words from whence a promise to pay money can be reasonably inferred. Hence the common memorandum of I O U can be considered only as evidence of an account stated and settled between the parties, and a balance due from one party to the other<sup>3</sup>.

It has been a point much agitated, whether it was necessary that a bill or note should import to have been given for value received; but that question was settled in the negative in the case of *White v. Ladwick*<sup>4</sup>. To entitle, however, the holder of a bill for the payment of 20*l.* or upwards, to recover interest and damages against the drawer and indorser in default of acceptance, a bill must, by the statutes 9 and 10 W. III. c. 17. and 3 and 4 Anne, c. 9. s. 4. contain words to that effect. The inserting of these words is therefore in all cases advisable<sup>5</sup>.

A promissory note requires no protesting, though it may have been indorsed over by a variety of people; for, as there is no drawee, there can be no protest either for non-acceptance or for non-payment. The law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing; and therefore, in cases of non-payment, the person holding the note has his

<sup>1</sup> *Morris v. Lee*, 2 I.d. Raym. 1396.

<sup>2</sup> See page 433 ante.

<sup>3</sup> *Fisher v. Leslie*, 1 Esp. N. P. C. 426.

<sup>4</sup> B. R. Hil. 25 Geo. III.

<sup>5</sup> *Bishop v. Young*, 2 Bos. and Pul. 81.

remedy against the drawer at any distance of time within the period of six years, although he has neglected to give advice of its dishonour. This is an advantage to which the holder of a promissory note is entitled, but which does not extend to the holder of a check or draft.

### *Bank Notes.*

These notes are payable on demand, and, by the general consent of mankind, are treated as money in the ordinary course and transactions of business<sup>1</sup>. But a tender of them is not sufficient, if objected to at the time of the offer<sup>2</sup>; though, after such a tender, a creditor cannot arrest his debtor<sup>3</sup>. They cannot be recovered by the legal owners from a bonâ fide holder for a valuable consideration, and who obtained possession of them without notice of the true owners<sup>4</sup>; for the holder of a bank note is primâ facie entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity<sup>5</sup>. And as possession is primâ facie evidence of property in negotiable instruments; in trover for the recovery of a lost note, the defendant will not be called upon to show his title to the note, without evidence from the other side that he got possession of it malâ fide or without consideration<sup>6</sup>.

### *Bankers' Notes.*

Bankers' cash-notes, or goldsmiths' notes, as they were formerly called, are promissory notes payable to order or bearer on demand, and are transferable by delivery. They may however be negotiated by indorsement, in which case

<sup>1</sup> *Miller v. Race*, 1 Bur. 457.

<sup>2</sup> *Wright v. Reed*, 3 T. R. 554.

<sup>3</sup> 38 Geo. III. c. 1. s. 8. 43 Geo. III. c. 18. s. 2.

<sup>4</sup> *Lowndes et al. v. Anderson, et al.* 13 East's Rep. 130.

<sup>5</sup> *Solomons v. Bank of England*, 13 East's Rep. 135.

<sup>6</sup> *King v. Milsom*, 2 Camp. N. P. C. 5.

the act of indorsing will operate as the making of a bill of exchange. On account of their being payable on demand, they are considered as cash, whether payable to order or not; but if presented in due time, and dishonoured, they will not amount to payment<sup>1</sup>. At present cash-notes are seldom made, except by country bankers, their use having been superseded by the introduction of checks<sup>2</sup>.

*Checks or Drafts on Bankers.*

A check or draft is as negotiable as a bill of exchange<sup>3</sup>. In case of default of payment by the drawee, the assignee may maintain an action against the assignor on the consideration of the transfer, unless it was expressly agreed at the time of the transfer that the assignee should take the instrument assigned as payment, and run the risk of its being paid, or that he has not used due diligence; in which cases it will amount to payment, and in the event of the failure of the banker, the assignor and every other party to the check will be discharged<sup>4</sup>.

As to the precise time when a check should be presented for payment, there is some degree of uncertainty. It may, however, be collected from the cases, that a check on a banker, payable on demand, ought, if given in the place where it is payable, to be presented for payment the same day it is received, or at furthest early in the next morning, unless prevented by distance or some inevitable cause or accident, which in all cases will excuse the neglect to make a presentment so soon as would otherwise be necessary<sup>5</sup>. And therefore, where a check received at half-past eleven in the morning was not presented for payment till the next day

<sup>1</sup> *Owenson v. Morse*, 7 T. R. 64.

<sup>2</sup> *Chitty*.

<sup>3</sup> *Boehm v. Sterling*, 7 T. R. 423.

<sup>4</sup> *Owenson v. Morse*, 7 T. R. 64. *Ward v. Evans*, 2 Ld. Raym. 930.

<sup>5</sup> *Kyd*, 45. *Baylley*, 65. n. c. *Ward v. Evans*, Ld. Raym. 928. *Fletcher v. Sandys*, 2 Str. 1248. *Tindal v. Brown*, 1 T. R. 168.

at two, the holder was held to have been guilty of laches, the banker having stopped payment at that time<sup>1</sup>. But in point of law, there is no other settled rule than that the presentment must be made within a reasonable time, which, as observed by Lord Ellenborough, must be accommodated to other business and affairs of life, and the party is not bound to neglect every other transaction in order to present the check on the same day that he receives it<sup>2</sup>.

Checks received by bankers in the course of one day, if presented for payment on the following day, such presentment will be valid<sup>3</sup>.

Payment of a check or draft before it is due is contrary to the usual course of business. And therefore, where a banker paid a check before it bore date, which had been lost by the payee, he was held liable to pay the amount over again to the loser<sup>4</sup>.

So, if bankers pay a cancelled check under circumstances which ought to have excited their suspicion, and induced them to make inquiries before paying it, they cannot take credit for the amount in their customer's account<sup>5</sup>.

When payment of a bill or note is made by the drawee's giving a draft or check upon a banker, it is not advisable to give up the bill until the draft is paid<sup>6</sup>.

If the holder of a draft on a banker receives payment thereof in the banker's notes instead of cash, and the banker fails, the drawer of the check will be discharged<sup>7</sup>.

By the statute 44 Geo. III. c. 98, sched. A. drafts or checks for the payment of money to the bearer on demand, bearing date on or before the day on which they are issued,

<sup>1</sup> *East India Company v. Chitty*, 2 Str. 1175.

<sup>2</sup> *Darbishire v. Parker*, 6 East's Rep. 3.

<sup>3</sup> *Ruckford v. Ridge*, 2 Camp. 537.

<sup>4</sup> *Da Sylva v. Fuller*, Chitts, 127.

<sup>5</sup> *Scholey v. Ramsbottom*, 2 Camp. N.P.C. 485.

<sup>6</sup> Mar. 21.

<sup>7</sup> *Vernon v. Boverie*, 2 Show. 296.



and at the place where the same are made, and drawn on a banker residing, or transacting the business of a banker, within ten miles of the place at which such drafts or orders are drawn or given, are exempt from stamp duties, provided that the place where the check was drawn is truly expressed in or upon such drafts or checks.

In the construction of this act, it has been determined that the person on whom the draft or check is drawn must be *bonâ fide* a banker<sup>1</sup>, and that if post dated and not stamped, it will be invalid<sup>2</sup>.

### 16. *Of Usury on Bills, Notes, &c.*

As by the statute 12 Anne, st. 2. c. 16. all securities given for an illegal consideration are declared to be invalid; if a bill of exchange, or note, therefore, is given in consequence of a contract usurious in its inception<sup>3</sup>, or of a subsequent usurious agreement on the indorsement<sup>4</sup>, or the discounting of it<sup>5</sup>, it is absolutely void. And should it be in the hands of a *bonâ fide* holder, who may have taken it in the fair and regular course of business without any notice of the usury, he can only recover the amount from the person from whom he received it; and moreover only on the original consideration<sup>6</sup>.

So if a bill of exchange is drawn upon an agreement between one of the original parties to it, and a person not a party to it, that the latter shall get it discounted by another person likewise not a party to the bill, upon usurious terms, and it is so discounted accordingly, the bill is void for the usury in the hands of an innocent indorsee<sup>7</sup>.

<sup>1</sup> *Ruff v. Webb*, 1 Esp. N. P. C. 128.

<sup>2</sup> *Allen v. Keeves*, 1 East's Rep. 435.

<sup>3</sup> *Lowe v. Waller*, Doug. 735.

<sup>4</sup> *Daniel v. Cartony*, 1 Esp. N. P. C. 274.

<sup>5</sup> *Acland v. Pearce*, 2 Camp. N. P. C. 599.

<sup>6</sup> *Ibid.* *Bowyer v. Bampton*, Str. 1155.

<sup>7</sup> *Young v. Wright*, 1 Camp. N. P. C. 139.

But if a new security is given, in lieu of a prior one, which was void in respect of the usurious consideration on which it was founded, it will not be invalid in the hands of a bonâ fide holder for a valuable consideration, and without notice of the usury<sup>1</sup>, though it would be otherwise in the hands of the party to the first illegal transaction<sup>2</sup>.

Neither is a fresh promise or security given by the borrower to repay the principal and legal interest, and founded on a sufficient consideration, invalid, the original usurious securities having been destroyed by the consent of both parties<sup>3</sup>.

So if a creditor takes the joint security of his debtor and another person in satisfaction of his debt, it is not avoided by a plea that it was made upon an usurious contract between the obligors, provided the obligee was not privy to the usurious transaction<sup>4</sup>.

But a contract reserving to the lender a greater advantage than is allowed by the statute, is usurious, and therefore void; for no colour, however specious, will exempt an usurious transaction from the danger of the statutes against usury. Therefore, if on discounting a bill or note the party requires the borrower to take goods in part, which are above the value which they would fetch on a resale, the transaction will be within the meaning of the statute<sup>5</sup>. And this decision receives further authority from the case of *Davis v. Hardacre*<sup>6</sup>, in which Lord Ellenborough said, "If goods are forced upon a borrower, I must have proof that they were estimated at a sum for which he could render them available upon a resale, not at what might possibly be a fair price to charge to a purchaser who stood in need of them."

<sup>1</sup> *Cuthbert v. Haley*, 8 T. R. 390.

<sup>2</sup> *Witham v. Lee*, 4 Esp. N. P. C. 264.

<sup>3</sup> *Barnes v. Hedley*, 2 Taunt. 184.

<sup>4</sup> *Illis v. Warnes*, Cro. Jac. 33.

<sup>5</sup> *Coombe v. Miles*, 2 Camp. N. P. C. 553.

<sup>6</sup> *Ibid.* 375.

But

But from the above case of *Coombe v. Miles*, if it appears that the borrower voluntarily acceded to such mode of discount as advantageous to him, the plaintiff is not bound to prove that the goods were fairly charged, but the burden of the proof lies upon the defendant.

It is not usury for an acceptor to discount his own acceptance at a premium. Thus the acceptor of a bill dated 4th of July, and due the 7th of September, taking a premium of sixpence in the pound from the indorsee and holder for payment of the bill on the 20th of August following, before it was due, was held not to be guilty of usury, there being no loan or forbearance. Lord Ellenborough said, that to constitute usury there must be a direct loan, and a taking of more than legal interest for the forbearance of repayment; or there must be some scheme contrived for the purpose of concealing or evading the appearance of a loan and forbearance when in truth it was such. But here was no loan or forbearance, only an anticipation of the payment of a debt by the party before the time when by law he could be called upon for it. He admitted that the defendant had been guilty of a very improper practice, but not of usury<sup>1</sup>.

If a bill or note is payable at a short date, it has been adjudged not to be illegal to deduct the discount<sup>2</sup>. And it has been decided, that bankers, in discounting bills, may not only deduct five per cent. but also a reasonable sum agreeable to the usage of the trade, as commission for their trouble and risk in remitting the bill or note for payment, and for other necessary and incidental expenses<sup>3</sup>. But if a banker deducts the discount of five per cent. upon a bill for the whole time it has to run, and, instead of paying money for the bill, gives a draft even at a short date, this has been held

<sup>1</sup> *Barclay v. Walmsley*, 4 East's Rep. 55.

<sup>2</sup> *Lloyd v. Williams*, 2 Bl. Rep. 792.

<sup>3</sup> *Winch v. Fenn*, cited in 2 T. R. 52.

to be usury; for he not only gains five per cent. but also the further benefit of the money till that draft is paid<sup>1</sup>. Had it, however, been done at the request or for the convenience of the holder, who might have had cash instead of such bills, it would not amount to usury<sup>2</sup>.

Bankers cannot charge compound interest without an express contract for that purpose<sup>3</sup>. But it has been decided, that they may strike a balance in their accounts, and legally charge interest on that balance, if not done too frequently, and out of the ordinary course of business<sup>4</sup>.

If a person discounts a bill for the drawer upon the terms that he shall receive five per cent. discount, and an additional sum for guarantying the payment of the bill by the acceptor, he having no doubt of the acceptor's solvency, this is an usurious contract<sup>5</sup>.

So if a factor advances money to purchase goods, and he receives, besides legal interest, a higher commission on these purchases than he would have been contented to take had he not advanced, the transaction is usurious, and a bill given for the same will be invalid<sup>6</sup>.

But if a broker gets bills discounted by another person at legal interest, the transaction is not usurious, and will not affect the validity of the bills in the hands of a *bonâ fide* indorsee, however large a commission the broker may have received himself, and although he is liable to the penalties of the statute<sup>7</sup>.

Where a check is given on an usurious transaction, without a special agreement to consider the check as cash, it

<sup>1</sup> *Matthews v. Griffiths*, Peake's N. P. C. 200.

<sup>2</sup> *Sir B. Hammet v. Sir W. Yea*, 1 Bos. and Pul. 141.

<sup>3</sup> *Dawes v. Pinner*, 2 Camp. N. P. C. 486. n.

<sup>4</sup> *Caliot v. Walker*, 1 Austr. 495.

<sup>5</sup> *Lec v. Cass*, 1 Taunt. 511.

<sup>6</sup> *Harris v. Boston*, 2 Camp. N. P. C. 348.

<sup>7</sup> *Dagnall v. Wigley*, 11 East's Rep. 43. 2 Camp. N. P. C. 23. S. C.

cannot be deemed an advance of money within the statute of usury, until cash has been actually received for it<sup>1</sup>.

In all cases where a bill is in its origin illegal and usurious, or where the holder has become a party to the usury, no action can be sustained for even the principal and lawful interest<sup>2</sup>. But though all securities given on an usurious consideration are immediately void, yet the penalty imposed by the statute 12th Anne is not incurred till more than legal interest is actually paid<sup>3</sup>.

### *17. Of Interest on Bills, &c.*

As interest is generally payable on all liquidated sums, payable at a certain time<sup>4</sup>, it is recoverable on bills and notes payable at a day certain<sup>5</sup>, for money lent<sup>6</sup>, and for money paid<sup>7</sup>; but it is not recoverable on a debt for goods sold, even on limited credit<sup>8</sup>, or for work and labour done<sup>9</sup>.

The time when interest begins to run upon a bill or note is from the time of making the protest<sup>10</sup>; and when it stops is when final judgement is signed<sup>11</sup>. If it is expressed in the instrument itself that interest is to be payable, the time of its payment will then depend upon the conditions specified. When bills or notes are payable on demand, interest is recoverable from the time of the demand proved<sup>12</sup>. When a note is payable by instalments, and on failure of

<sup>1</sup> *Brooke v. Middleton*, 1 Camp. N. P. C. 445. *Porrodaile v. Middleton*, 2 *Ibid.* 53.

<sup>2</sup> *Benfield v. Solemons*, 9 Ves. Jun. 84.

<sup>3</sup> *Fisher v. Beasley*, Doug. 223.

<sup>4</sup> *Blancy v. Hendrick*, 2 Bl. Rep. 761. *Robinson v. Bland*, 2 Bur. 1085.

<sup>5</sup> *Upton v. Lord Ferrers*, 5 Ves. Jun. 803.

<sup>6</sup> *Robinson v. Bland*, 2 Bur. 1085.

<sup>7</sup> *Trelawne v. Thomas*, 1 Hen. Bl. 305.

<sup>8</sup> *Gordon v. Swan*, 12 East's Rep. 419.

<sup>9</sup> *Blancy v. Hendrick*, 2 Bl. Rep. 761.

<sup>10</sup> *Louviere v. Larbray*, 10 Mod. 88.

<sup>11</sup> *Robinson v. Bland*, 2 Bur. 1085.

<sup>12</sup> *Farquhar v. Morris*, 7 T. R. 124.



payment of any instalment the whole is to become due, the interest is to be calculated on the whole sum remaining unpaid on default of any instalment, and not on the respective instalments at the respective times when they would become payable<sup>1</sup>. And when goods are sold to be paid for by a bill of exchange, and the purchaser does not give the bill accordingly, the vendor is entitled to interest from the time the bill, if given, would have become due<sup>2</sup>, whether the defendant has or has not accepted the goods<sup>3</sup>.

To entitle a holder of an inland bill or note for the payment of 20 *l.* or upwards to recover interest, &c. protest of the dishonour must have been made by virtue of the statutes 9 and 10 Will. III. c. 17. and 3 and 4 Anne, c. 9.

## CHAPTER XI.

### OF BANKRUPTCY.

#### 1. *What Persons are liable to the Bankrupt Laws.*

ALL persons, whether natural born subjects, aliens, or denizens, being in trade, and capable of making binding contracts, by virtue of the statutes 13 Eliz. c. 7. s. 1. 1 Jac. I. c. 15. s. 2. and 21 Jac. I. c. 19. s. 15. are liable to the bankrupt laws. Clergymen<sup>4</sup>, and persons having privilege of parliament, whether peers or commoners<sup>5</sup>, are subject to the operation of the bankrupt laws. But infants<sup>6</sup> and married women<sup>7</sup> cannot be made bankrupts. And if a feme sole, being a trader, marries, a commission issued after the marriage cannot be supported<sup>8</sup>. To these

<sup>1</sup> Blake v. Lawrence, 4 Esp. N. P. C. 147.

<sup>2</sup> Porter v. Palgrave, 2 Camp. N. P. C. 480. Beecher v. Jones, Ibid. 128. n.

<sup>3</sup> Boyce v. Warburton, Ibid. 480.

<sup>4</sup> Hankey v. Jones, Cowp. 745.

<sup>5</sup> 4 Geo. III. c. 33. 45 Geo. III. c. 124. s. 1. Ex parte Meymot, 1 Atk. 200.

<sup>6</sup> Ex parte Sydebotham, Ibid. 146.

<sup>7</sup> Co. B. L. 29.

<sup>8</sup> Ex parte Mear and Wife, 2 Bro. C. C. 266.

positions there are however exceptions. For a femè covert, being a sole trader, according to the custom of London, is subject to the bankrupt laws with respect to her separate effects in trade<sup>1</sup>. So where the husband has abjured the realm, become an exile, been transported, is divorced a vinculo matrimonii, or the like, and the wife has become liable on her contracts so as to be sued at law and charged in execution, she is liable to a commission of bankruptcy<sup>2</sup>.

And in *ex parte Watson*<sup>3</sup>, an infant who had held himself forth to the world as an adult, and *sui juris*, and had traded in that character for two years, was held liable to the bankrupt laws.

In the case of partnerships, all the partners may become bankrupts together; or one only may become bankrupt, even in respect of a joint debt due from all the partners, while the others remain solvent<sup>4</sup>.

## 2. *What constitutes a Trading within the Bankrupt Laws*

Any merchant or other person using the trade of merchandise, by way of bargaining, exchange, bartering, cherrisance, or otherwise, in gross, or by retail, or seeking his trade of living by buying and selling, is subject to the bankrupt laws<sup>5</sup>. Also bankers, brokers, factors<sup>6</sup>, dealers in coals, scriveners<sup>7</sup>, vintners, brickmakers<sup>8</sup>, butchers<sup>9</sup>, manufacturers of every description who purchase commodities, and manufacture them into articles for sale, as clothiers, locksmiths, brewers<sup>10</sup>, goldsmiths<sup>11</sup>, plumbers<sup>12</sup>, smiths<sup>13</sup>, shoe-makers<sup>14</sup>, nailors<sup>15</sup>, tanners<sup>16</sup>, bakers<sup>17</sup>, milli-

<sup>1</sup> *Ex parte Carrington*, 1 Atk. 206.

<sup>2</sup> *Corbet v. Poelnitz*, 1 T. R. 5.

<sup>3</sup> 16 Ves. Jun. 265.

<sup>4</sup> *Crisp v. Perritt*, Willes, 467.

<sup>5</sup> 13 Eliz. c. 7; 21 Jac. 1. c. 19. s. 2.

<sup>6</sup> 5 Geo. II. c. 30. s. 39.

<sup>7</sup> *Ex parte Burchall*, 1 Atk. 141.

<sup>8</sup> *Ex parte Harrison*, 1 Bro. C. C. 173.

<sup>9</sup> *Dally v. Smith*, 4 Bur. 2148.

<sup>10</sup> 1 Ld. Raym. 610.

<sup>11</sup> *Stone*, 120.

<sup>12</sup> *Hut*, 46.

<sup>13</sup> 2 Bl. Com. 476.

<sup>14</sup> *Crumpe v. Barne*, Cro. Car. 31.

<sup>15</sup> *Goodinge*, 12.

<sup>16</sup> *Newton v. Trigg*, 3 Mod. 330.

<sup>17</sup> *Beawes*, Lex Merc. 488.

ners, dyers<sup>1</sup>, pawnbrokers<sup>2</sup>, smugglers<sup>3</sup>, and carpenters who buy materials for the use of their trade<sup>4</sup>, are liable to a commission of bankrupt.

But contractors for victualling the royal navy<sup>5</sup>, drovers of cattle, farmers, graziers<sup>6</sup>, innkeepers<sup>7</sup>, alehouse keepers or victuallers<sup>8</sup>, receivers general of the parliamentary taxes<sup>9</sup>, and the holders of stock in the Bank of England, in the East India, South Sea, Guinea, London Assurance, Royal Exchange, and English Linen Companies, and adventurers in the Royal Fishing Trade, are not, in respect of such stock, liable to the bankrupt laws.

Neither is it a trading sufficient to subject the party to be made a bankrupt, if the owner of a mine buys candles and sells them to his workmen<sup>10</sup>; or if a schoolmaster buys books and shoes and sells them at a profit to his scholars<sup>11</sup>. Nor is a maker of alum<sup>12</sup>, or an underwriter, merely as such, within the statute<sup>13</sup>.

Neither is an innkeeper or a victualler subject to the bankrupt laws while he confines himself to supplying his guests with necessaries, or selling liquors out of his house in small retail quantities. But if he deals in liquors as a distinct business, and sells them to all persons who apply for them, he may be made a bankrupt<sup>14</sup>.

So if a farmer buys horses for the express purpose of selling again at a profit<sup>15</sup>, or buys potatoes, and sells them with others raised upon his own land<sup>16</sup>, he may be a bankrupt upon such trading.

<sup>1</sup> Port v. Turton, 2 Wils. 169.

<sup>2</sup> Highmore v. Molloy, 1 Atk. 205.

<sup>3</sup> Ex parte Meymott, Ibid. 199.

<sup>4</sup> Chapman v. Lamphire, 3 Mod. 155.

<sup>5</sup> 1 Vent. 270.

<sup>6</sup> 5 Geo. II. c. 30. s. 40.

<sup>7</sup> 3 Lev. 310.

<sup>8</sup> 4 Bur. 2064.

<sup>9</sup> 5 Geo. II. c. 30. s. 40.

<sup>10</sup> Cooke, B. L. 58.

<sup>11</sup> Valentine v. Vaughan, Peake, N. P. C. 76.

<sup>12</sup> Cooke, B. L. 60.

<sup>13</sup> Ex parte Bell, 15 Ves. Jun. 235.

<sup>14</sup> Patman v. Vaughan, 1 T. R. 572. Holme and Wilson v. Bough, cited in 1 Selw. N. P. 199.

<sup>15</sup> Bartholomew v. Sherwood, 1 T. R. 573.

<sup>16</sup> Mayo v. Archer, 1 Str. 513.

But in *Stewart v. Ball* <sup>1</sup>, it was held that a farmer, who occasionally bought hay, corn, horses, pigs, &c. with a view to sell again for profit, did not thereby make himself a trader within the bankrupt laws, because these commodities are incident to the occupation of a farmer.

A farmer and grazier exercising also the business of a drover, by buying and selling cattle from time to time, beyond the occasions of his farm, is exempted from the operation of the bankrupt laws, by stat. 5 Geo. II. c. 30. s. 40. And the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader <sup>2</sup>.

And though a brickmaker is within the statute, yet a distinction subsists where the business is carried on only as a mode of enjoying the profits of a real estate, and when it is carried on substantially, and independently as a trade. Thus, where a devisee for life of an estate, part of which consisted of brick ground, made bricks there for sale generally, with a view to profit, he was held not to be a trader within the meaning of the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks, and had, before the estate came to him by devise, occupied the same ground as a brickmaker for general sale <sup>3</sup>.

If a man buys a coal-mine, works it, and sells the coals, he is not a trader within the meaning of the bankrupt laws <sup>4</sup>. But if he sells the coal from the mine, together with others which he bought at market, then he becomes a trader within the statutes <sup>5</sup>.

A builder who buys timber which he works into the

<sup>1</sup> 2 New Rep. 78.

<sup>2</sup> *Bolton v. Sowerby*, 11 East's Rep. 274.

<sup>3</sup> *Sutton v. Weeley*, 7 East's Rep. 442.

<sup>4</sup> *Port v. Turton*, 2 Wils. 169.

<sup>5</sup> *Ibid.* 170.

houses which he builds, and sells the houses when built, is not a trader within the statute<sup>1</sup>.

Neither is the building of a theatre to be held in shares, and to be paid for by measure and value, and of which the builder held nine shares, a trading within the bankrupt laws<sup>2</sup>.

Being part owner in a ship, unless he freights it, or in a barge, waggon, or hackney coach, will not make a man a trader<sup>3</sup>.

Drawing and redrawing bills of exchange, with a view to gain a profit upon the exchange, is a trading sufficient to subject the party to be made a bankrupt, if it be general, and not merely occasional<sup>4</sup>. But an occasional drawing and redrawing of bills on a person's own account, for the purpose of raising money to improve his estate, or for other private occasions, and paying for their being discounted, besides interest, and borrowing accommodation notes in exchange for his own to the same amount, will not make a man an object of the bankrupt laws<sup>5</sup>. And the statutes relating to exchequer bills expressly provide that a party circulating the same shall not be deemed a trader within the bankrupt laws<sup>6</sup>.

A trader having retired from business, may become a bankrupt in respect of debts contracted during the period of his trading<sup>7</sup>.

One single act of buying and selling will not make a man a trader, nor will buying only or selling only; but it must be a repeated practice both of buying and selling in order to get a livelihood<sup>8</sup>. Therefore a mere artisan or handicraftsman,

<sup>1</sup> *Clarke v. Wisdom*, 5 Esp. N. P. C. 147.

<sup>2</sup> *Williams v. Stevens*, 2 Camp. N. P. C. 300.

<sup>3</sup> *Ex parte Bowes*, 4 Ves. Jun. 168. 1 Vent. 29.

<sup>4</sup> *Richardson v. Bradshaw*, 1 Atk. 128.

<sup>5</sup> *Hankey v. Jones*, Cowp. 745.

<sup>6</sup> *Co. B. L.* 67.

<sup>7</sup> 1 Vent. 5.

<sup>8</sup> 2 Bl. Com. 476. 1 Com. Dig. 522. *Holroyd v. Gwynne*, 2 Taunt. 176.



who obtains his living by his personal labour only, is not subject to the bankrupt laws<sup>1</sup>. And on this principle it has been decided, that if a person imports goods without selling them<sup>2</sup>, or sells off goods bought for his private use, or for any special purpose<sup>3</sup>, it is not a trading within the meaning of the statute.

If the executor of a person who was a trader dispose of his testator's stock in trade, it will not be such a trading as to subject him to be made a bankrupt, even if the executor found it necessary to purchase articles to mix with and make the stock of the testator more fit for sale<sup>4</sup>. But if the executor buy the same articles as the testator dealt in, and sell them entire, he will be a trader, and on such dealing be subject to a commission of bankrupt<sup>5</sup>.

### *3. What Acts amount to Bankruptcy.*

The better to obtain a clear and comprehensive view of the decisions upon the subject of this section, we shall consider separately each head of bankruptcy upon which any question appears to have been raised; premising that the statutes of bankruptcy are, as to the act of bankruptcy and trading, confined to England, and do not extend to acts done in other dominions of Great Britain, or in foreign countries<sup>6</sup>.

But if the trading should be by buying only in England, and selling beyond the sea<sup>7</sup>; or buying beyond sea, and selling only in England; or if the party should only trade to England, and not reside there, it is a trading within the bankrupt laws<sup>8</sup>. And if a party residing abroad comes to

<sup>1</sup> Chapman v. Lamphire, 3 Mod. 155.

<sup>2</sup> 1 Vent. 29.

<sup>3</sup> Ex parte Nutt, 1 Atk. 102.

<sup>4</sup> Dodsworth v. Anderson, Raym. Rep. 375.

<sup>5</sup> Alexander v. Vaughan, Cowp. 398.

<sup>6</sup> 2 Keb. 487.

<sup>7</sup> Cooke, B. L. 44.

<sup>8</sup> Alexander v. Vaughan, Cowp. 398.

Inglis v. Grant, 6 T. R. 350.

England, and commits an act of bankruptcy, he is subject to the bankrupt laws <sup>1</sup>.

So if one of two partners in a house in Dublin purchase goods in England, in the joint name of himself and partner, it has been determined that the debt so created made the partner resident in Dublin subject to the bankrupt laws <sup>2</sup>.

With respect to the act of bankruptcy, stopping payment, or refusing payment, does not amount to an act of bankruptcy, if the party appears in his business<sup>3</sup>. But by the statutes 13 Eliz. c. 7. s. 1. and 1 Jac. I. c. 15. s. 2. it is enacted, that the following acts committed by any person using the trade of merchandise, &c. shall be acts of bankruptcy.

*“ Depart the Realm.”*

This must be done with an intention to defraud or delay creditors; for delay without such intention will not be an act of bankruptcy<sup>4</sup>.

But an intention to delay creditors, although no delay takes place, is an act of bankruptcy<sup>5</sup>.

*“ Or begin to keep House.”*

To constitute an act of bankruptcy, the beginning to keep house must be done with an intent to defraud or delay creditors; which intent is evidenced by being actually denied to a creditor<sup>6</sup>. But an order to be denied is not sufficient without an actual denial<sup>7</sup>. And the denial must be to a creditor who has a debt due to demand. A denial, therefore, to the holder of a security payable at a future day will not be sufficient, although the security be such as may by the statute 7 Geo. I. c. 31. s. 1, 2. be proved under the commission<sup>8</sup>. But a denial to the holder of a bill, or his clerk,

<sup>1</sup> Williams v. Nunn, 1 Taunt. 270.      <sup>2</sup> Ibid.      <sup>3</sup> Cullen's B. L. 65.

<sup>4</sup> Fowler v. Padget, 7 T. R. 509.    Ex parte Mutrie, 5 Ves. Jun. 576.

<sup>5</sup> Robertson v. Liddell, 9 East's Rep. 487.

<sup>6</sup> Garratt v. Moule, 5 T. R. 575.

<sup>7</sup> Hawkes v. Saunders, Cooke, B. L. 74.

<sup>8</sup> Ex parte Levy, 7 Vin. Abr. 6. pl. 14.

on the morning of the day on which it becomes due is sufficient, and cannot be avoided by afterwards appearing in public, and paying the bill before five o'clock of that day<sup>1</sup>. So in the case of *Jeffs v. Smith*, 2 Taunt. 401. it was held that a denial by the express order of the trader to a tax-gatherer who called for the taxes, was an act of bankruptcy.

A denial by order of a trader to a creditor is not of itself an act of bankruptcy, but only evidence of it, and therefore open to explanation. Being denied when sick, engaged in company, particular business, or owing to the lateness of the hour, are not acts of bankruptcy<sup>2</sup>.

On the other hand it is not necessary, in order to constitute a denial an act of bankruptcy, that the bankrupt should have given orders to deny any particular creditor; for a general order of denial, followed by an actual denial, is sufficient<sup>3</sup>.

It is not absolutely necessary that the denial should be to the creditor personally<sup>4</sup>; a denial to his clerk<sup>5</sup>, or to his servant<sup>6</sup>, is sufficient.

In a case where it appeared that the creditor, to whom the denial was supposed to have been given by the plaintiff's clerk, had only demanded payment of the debt, but had not asked to see the plaintiff personally, and that the clerk supposed to give the denial had no specific directions for giving it, it was held that such denial did not amount to an act of bankruptcy<sup>7</sup>.

A denial to avoid an attachment for non-delivery of goods,

<sup>1</sup> *Colkett v. Freeman*, 2 T. R. 59. *Mucklow v. May*, 1 Taunt. 479.

<sup>2</sup> *Ex parte Hall*, 1 Atk. 201. *Worseley v. De Mattos*, 1 Bur. 484. Bul. N. P. 38.

<sup>3</sup> *Round v. Bye*, Cooke, B. L. 94. *Mucklow v. May*, 1 Taunt. 479.

<sup>4</sup> *Bramley v. Mundee*, Bul. N. P. 39.

<sup>5</sup> *Colkett v. Freeman*, 2 T. R. 59.

<sup>6</sup> *Ex parte Bamford*, 15 Ves. Jun. 449.

<sup>7</sup> *Dudley v. Vaughan*, 1 Camp. N. P. C. 271.

as it is only to evade doing a duty, does not amount to an act of bankruptcy<sup>1</sup>. But a denial to a creditor to avoid service out of chancery, upon a decree for payment of a debt, is otherwise<sup>2</sup>.

A concerted act of bankruptcy will not support a commission: and therefore, if a creditor calls upon the bankrupt, by agreement, that he may deny himself, or otherwise concert an act of bankruptcy with the bankrupt, the commission cannot be supported upon such concerted act<sup>3</sup>. If, however, a creditor not privy to the agreement calls upon the bankrupt, and he is denied, the denial will be good evidence of an act of bankruptcy<sup>4</sup>.

*“ Or absent himself.”*

This if done with a view to delay creditors is an act of bankruptcy, although no creditor has been thereby delayed<sup>5</sup>. But it is not an act of bankruptcy if he absent himself for any other purpose than to defraud or delay his creditors: as if to avoid an arrest upon an excommunicato capiendo<sup>6</sup>, or the service of process to enforce a decree in chancery, or an attachment on an award for non-delivery of goods pursuant to the award<sup>7</sup>; for these are not debts, but duties only.

*“ Or willingly and fraudulently procure himself to be arrested or yield himself to prison.”*

This, if done for a fictitious debt, is deemed an attempt to defraud creditors, and consequently an act of bankruptcy. And even where a man yields himself to prison for a just debt, if done with an intent to delay or defraud creditors,

<sup>1</sup> Lingwood v. Eade, 1 Atk. 196. <sup>2</sup> 2 Com. Dig. 5.

<sup>3</sup> Bramley v. Mundee, Bul. N. P. 39. Ex parte Bourne, 16 Ves. Jun. 145.

<sup>4</sup> Ex parte Edmonson, 7 Ibid. 303. Ex parte Bourne, 16 Ibid. 145.

<sup>5</sup> Bigg v. Spooner, 2 Esp. N. P. C. 651. Judine v. Da Cossens, 1 New Rep. 234.

<sup>6</sup> 1 Com. Dig. 521.

<sup>7</sup> Davis's B. L. 45.

and the party lies in prison two months, it is an act of bankruptcy<sup>1</sup>.

The act of bankruptcy by lying in prison two months, relates to the first day of the surrender<sup>2</sup>. But where bail is really put in, the bankruptcy takes its operation from the time of the surrender<sup>3</sup>. In case of mere formal bail, however, the bankruptcy relates to the time of the first arrest<sup>4</sup>.

*“ Or willingly or fraudulently procure his Goods, Money, or Chattels to be attached or sequestered.”*

The attachment meant by the legislature, is that by which suits are commenced in London, Bristol, and other towns, where that species of process is made use of. Hence, where a person executes a bond and warrant of attorney to confess judgement, either for a bonâ fide debt<sup>5</sup>, or for a larger sum than is really due<sup>6</sup>, and judgement is entered up accordingly, and the debtor's goods taken in execution, such execution is not an attachment, and consequently is not an act of bankruptcy within the meaning of this clause.

Neither is an adverse attachment or sequestration within the meaning of the statute: to produce this effect, it must be by the party's procuring, with an intent to delay creditors<sup>7</sup>.

*“ Or depart from his Dwelling-house.”*

To constitute this an act of bankruptcy, the bankrupt's intention to delay his creditor, by departing from his dwelling-house, is sufficient<sup>8</sup>. But the motive of the party may be explained by circumstances which will negative the apparent intent<sup>9</sup>. A compulsory absence, as in the case of being arrested, will not be an act of bankruptcy<sup>10</sup>. Nor an

<sup>1</sup> 13 Eliz. c. 7. 1 Jac. I. c. 5. *Ex parte Barton*, 7 Vin. Abr. 61, 62, pl. 15..

<sup>2</sup> *King v. Leith*, 2 T. R. 141. <sup>3</sup> *Rose v. Green*, 1 Bur. 437.

<sup>4</sup> *Ibid.* <sup>5</sup> *Harwood v. Spottiswood, Cooke, B. L.* 100.

<sup>6</sup> *Clancy v. Hayley*, Cowp. 427. <sup>7</sup> 2 Com. Dig. 6.

<sup>8</sup> *Hammond v. Hinks*, 5 Esp. N. P. C. 139.

<sup>9</sup> *Fowler v. Padget*, 7 T. R. 509. <sup>10</sup> *Green*, 53.



absence to avoid an attachment for not performing an award for the delivery of goods<sup>1</sup>: but it is otherwise if for the payment of a sum of money.

“ *Or suffer himself to be outlawed.*”

An outlawry suffered must be with an intent to defraud creditors, otherwise it is not an act of bankruptcy<sup>2</sup>.

“ *Or make or cause to be made any fraudulent Grant or Conveyance of his Lands, Tenements, Goods, or Chattels.*”

If a trader in contemplation of bankruptcy, in order to pay even a just and bonâ fide creditor, or one who by possibility may become a creditor (*viz.* a surety), assigns by deed all, or even a part of his effects to such creditor, the deed is fraudulent, and consequently an act of bankruptcy, whether possession was delivered to the creditor or not<sup>3</sup>. And the same rule holds if the assignment be to some creditors, but in total exclusion of others; or if the deed is executed in concert with several creditors, upon trust to pay all, and is afterwards abandoned by the creditors<sup>4</sup>. An assignment of all a trader's effects for the benefit of all his creditors, unless every creditor has concurred, is an act of bankruptcy<sup>5</sup>. But those who execute the deed cannot set it up as an act of bankruptcy<sup>6</sup>.

And an assignment of part of a trader's estate and effects, if made in contemplation of bankruptcy, will be fraudulent, and of course an act of bankruptcy<sup>7</sup>. But if a trader executes an assignment by deed of part of his effects, and delivers possession, or a nominal possession, and it does not

<sup>1</sup> *Lingwood v. Fade*, 1 Atk. 196.      <sup>2</sup> 2 Sid. 69.

<sup>3</sup> *Worseley v. Demattos*, 1 Bur. 467. *Wilson v. Day*, 2 Bur. 827. *Hassel v. Simpson*, Doug. 88. n.

<sup>4</sup> *Tappenden v. Burgess*, 4 East's Rep. 230.

<sup>5</sup> *Kettle v. Hammond*, Bul. N. P. 40.

<sup>6</sup> *Bamford v. Baron*, cited in 2 T. R. 594.

<sup>7</sup> *Linton v. Bartlet*, 3 Wils. 47. *Devon v. Watts*, Doug. 86.

appear that he had his bankruptcy in contemplation, the assignment will be good, and not an act of bankruptcy <sup>1</sup>.

In the conveyance of the whole or part of a bankrupt's estate, the circumstance of his being, at the time of the conveyance, under arrest at the suit of the creditor to whom the conveyance is made, will not give validity to the transaction <sup>2</sup>.

A conveyance of the whole or part of a trader's effects must be by deed to be valid. Therefore a fraudulent conveyance not by deed is not an act of bankruptcy <sup>3</sup>. But such conveyance, though it does not amount to an act of bankruptcy, will be void by reason of the fraud <sup>4</sup>.

Having stated the decisions which have been made upon the several acts of bankruptcy enumerated in the 13 Eliz. c. 7. and 1 Jac. I. c. 15. we shall proceed to the consideration of such acts as are mentioned in 21 Jac. I. c. 19. s. 2.

*“Procuring or obtaining any Protection, not being lawfully protected by Privilege of Parliament.”*

By the statute 7 Anne, c. 12. s. 5. traders are declared not to be entitled to the protection given by that act to ambassadors and their servants.

*“Or being arrested for Debt, shall, after his Arrest, lie in Prison two Months or more, upon that or any other Arrest or Detention in Prison for Debt.”*

In the construction of the act it has been determined, that lying in prison two lunar months will make the party a bankrupt from the first arrest; and that in computing the time, the day of the arrest is to be included <sup>5</sup>. But if there is not a continuing imprisonment from the time of the arrest,

<sup>1</sup> Jacob v. Shepherd, 1 Bur. 478. Manton v. Moore, 7 T. R. 67.

<sup>2</sup> Newton v. Chantler, 7 East's Rep. 138.

<sup>3</sup> Martin v. Pewtress, 4 Bur. 2477. Rust v. Cooper, Cowp. 629.

<sup>4</sup> Ibid. <sup>5</sup> Glassington v. Rawlins, 3 East's Rep. 407.

then the intention of the legislature appears to have been, that the two months should run only from the time of the party's going to prison, and not from the arrest<sup>1</sup>. Where bail is really put in, the bankruptcy only relates to the time of the surrender<sup>2</sup>.

*“ Or being arrested for 100 l. or more of just Debts, shall at any time after such Arrest escape out of Prison.”*

This must be an escape against the will of the sheriff, and such as shows that he intends to run away<sup>3</sup>.

The last mode by which an act of bankruptcy may arise depends on the statute 4 Geo. III. c. 33. which enacts, “ That the creditors to a certain value, *viz.* one creditor, or two, being partners, to the amount of 100 *l.* two creditors to the amount of 150 *l.* and three to the amount of 200 *l.* of any trader within the description of the bankrupt laws, having privilege of parliament, may (upon affidavit of the debt, and trading of the debtor, filed of record in any of the courts at Westminster,) sue out a summons, or original bill and summons, against such trader, and serve him with a copy; and if he shall not, within two months after personal service thereof, pay, secure, or compound the debt, or enter into a bond in such sum, and with such sureties as the court shall approve of, to pay such sum as shall be recovered in such action, with costs, he shall be adjudged a bankrupt from the time of the service of such summons.”

This provision of the legislature, as Mr. Selwyn observes<sup>4</sup>, was salutary; but having, on some occasions where bonds had been given in pursuance thereof, been rendered nugatory by the difficulty, and sometimes by the impossibility, of enforcing the entering of appearances in the actions, for the payment of the sums to be recovered, in which such

<sup>1</sup> Barnard v. Palmer, 1 Camp. N. P. C. 509.

<sup>2</sup> Bul. N. P. 39. Tribe v. Webber, Willes, 464.

<sup>3</sup> Rose v. Green, 1 Bur. 437.      <sup>4</sup> N. P. 206.

bonds had been given, it was enacted by the statute 45 Geo. III. c. 124. s. 1. "that every person, deemed a merchant, banker, broker, factor, scrivener, or trader, having privilege of parliament, shall be adjudged a bankrupt, unless he shall, within two months after being served with the process, enter a common appearance in the court in which the action is brought. And it has been determined, that by virtue of this statute, if such privileged trader does not obey an order of the court of Chancery or Exchequer to pay money, he thereby commits an act of bankruptcy, and may be declared a bankrupt accordingly<sup>1</sup>.

Each of the acts of bankruptcy which have been specified must be committed during trading, or subsequent thereto, and during the existence of a debt contracted when in trade<sup>2</sup>.

To support a joint commission against all the individuals of partnership, each of the partners must have committed an act of bankruptcy<sup>3</sup>.

As to the effect of an act of bankruptcy, a plain direct act of bankruptcy, once committed, cannot be purged or explained away, as a dubious equivocal act may, even though the party continues to carry on a great trade<sup>4</sup>. But where the act is in itself doubtful, it may be explained<sup>5</sup>.

#### *4. Of the Petitioning Creditor's Debt.*

The petitioning creditor must have a legal demand to the amount of 100*l.*; and if two creditors join in petitioning for a commission, their debts must be 150*l.*; if three or more join, they must be creditors for 200*l.*<sup>6</sup> But a debt in equity will in no circumstance support a commission; as in the

<sup>1</sup> *Read v. Philips*, 16 Ves. Jun. 437.

<sup>2</sup> *Ex parte Bamford*, 15 Ves. Jun. 449. *Ex parte Dewdney*, Ibid 495.

<sup>3</sup> *Beasley v. Beasley*, 1 Atk. 97.

<sup>4</sup> *Worseley v. Demattos*, 1 Bur. 484. *Hopkins v. Ellis*, Salk. 110.

<sup>5</sup> *Colkett v. Freeman*, 2 T. R. 59.

<sup>6</sup> 5 Geo. II. c. 30. s. 23.

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case of an assignee of a bond, the assignee cannot be a petitioning creditor<sup>1</sup>.

Before the statute 5 Geo. II. c. 30. it was considered that it did not alter the case whether the petitioning creditor's debt was contracted before or after the act of bankruptcy; but since that statute it has been decided, that it must be contracted before the act of bankruptcy<sup>2</sup>. And as it often happened, that after a commission had been issued upon a clear act of bankruptcy, and a good petitioning creditor's debt, a secret act of bankruptcy was proved to have been committed, prior to the petitioning creditor's debt being contracted, whereby considerable confusion and inconvenience arose in the administration of the bankrupt's affairs; it was provided by the statute 46 Geo. III. c. 135. s. 5. that no commission of bankrupt thereafter issued, should be avoided or defeated by reason of any act of bankruptcy having been committed by the bankrupt prior to the petitioning creditor's debt being contracted, if such petitioning creditor had not any notice of such act of bankruptcy at the time when the debt was to him contracted.

So much of this act as made the striking of a docket notice of a prior act of bankruptcy is repealed by the statute 49 Geo. III. c. 121.

The statute 5 Geo. II. c. 30. s. 22. enables creditors by bills, bonds, promissory notes, and other personal securities, payable at a future day, and drawn and issued before an act of bankruptcy, to sue out, or join in suing out, a commission of bankrupt, before they actually become due and payable; and by the 7th Geo. I. c. 31. they may prove the same under the commission, deducting a rebate of five per cent. for the time the bill has to run. And on the construction of this statute it has been held, that a bill of exchange for 100*l*.

<sup>1</sup> Ex parte Hylliard, 1 Atk. 146. 2 Ves. 407.

<sup>2</sup> Ex parte Wainman, Cooke, B. L. 23.



is sufficient to found a petition for a commission of bankrupt, though allowing a rebate of interest for the time it had to run after the issuing of the commission, would diminish the debt below 100*l.* at the time of the act of bankruptcy<sup>1</sup>. But goods sold and delivered on an agreement, to be paid for by a present bill payable at a future day, does not create a present debt on which to found a commission of bankrupt, if no such bill be actually given; for the intention of the legislature plainly confines the power of petitioning to such creditors as have written securities<sup>2</sup>.

If, however, a creditor for goods sold receive in payment a bill of exchange payable at a future day, and he negotiate it before the bankruptcy of the debtor, and is obliged to take it up upon its being dishonoured after his bankruptcy, he may sue out a commission upon his debt<sup>3</sup>.

If, after committing a secret act of bankruptcy, a trader gives his creditor a bond for a debt due on simple contract before the act of bankruptcy, it does not deprive the creditor of his right to petition<sup>4</sup>.

And if a creditor, knowing that his debtor has committed an act of bankruptcy, receive part of his debt, as the payment is void, he may support a commission on the original debt<sup>5</sup>.

A creditor for a debt after the party quitted trade, cannot sue out a commission<sup>6</sup>; but a creditor before he entered into trade, whose debt subsisted during the trading, may<sup>7</sup>.

If the debt is contracted before leaving off trade, and the act of bankruptcy is committed after leaving off trade, the creditor may take out a commission<sup>8</sup>.

<sup>1</sup> Brett v. Lovell, 13 East's Rep. 213.

<sup>2</sup> Hoskins v. Duperoy, 9 East's Rep. 498. Cothay v. Murray, 1 Camp. N. P. C. 335.

<sup>3</sup> Ex parte Marsden, 4 Mont. B. L. App. 7.

<sup>4</sup> Ambrose v. Clendon, 2 Str. 1043. <sup>5</sup> Man v. Shepherd, 6 T. R. 79.

<sup>6</sup> Daw v. Holdsworth, Peake's N. P. C. 61.

<sup>7</sup> Butcher v. Easto, Doug. 295.

<sup>8</sup> Ex parte Bamford, 15 Ves. Jun. 419.

But a debt arising by way of damages due upon a judgement after it is entered up, is not a sufficient debt in law, whereon to found a commission of bankruptcy against a trader who had committed an act of bankruptcy between the verdict and judgement <sup>1</sup>.

Neither can a petitioning creditor proceed at law against the bankrupt; for by suing out the commission he has determined his election, and is precluded from proceeding at law even for a debt distinct from the one he proved <sup>2</sup>. And by stat. 49 Geo. III. c. 121. s. 14. it is enacted, that proving or claiming a debt under a commission of bankrupt shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved and claimed.

Any objection that would preclude a creditor from recovering at law, or in equity, will equally preclude him from suing out a commission of bankruptcy. And therefore if a debt cannot be recovered at law, the statute of limitations having incurred, nor in equity by analogy to it, it will not be a sufficient petitioning creditor's debt; neither is such a debt proveable under a commission <sup>3</sup>.

A commission sued out upon a debt due jointly to a person residing in England, and others residing abroad in an enemy's country for the purposes of trade, although British subjects <sup>4</sup>; or if sued out upon the petition of only one of two partners to whom a joint debt is due <sup>5</sup>; cannot be supported, for all the parties must join in the petition. But in the case of partners, the affidavit of one that the debt is due to himself and partners is sufficient <sup>6</sup>.

<sup>1</sup> In re Charles, 14 East's Rep. 197.

<sup>2</sup> Ex parte Callow, 3 Ves. Jun. 1. Ex parte Ward, 1 Atk. 153.

<sup>3</sup> Ex parte Dewdney, 15 Ves. Jun. 495. Fowler v. Brown, Cooke, B. L. 13. Swayne v. Wallinger, 2 Str. 746. contra.

<sup>4</sup> Buckland v. Newsame, 1 Taunt. 477.

<sup>5</sup> McConnell v. Hector, 3 Bos. and Pul. 113.

<sup>6</sup> 2 Cooke, B. L. 1.

5. *Of the Commission.**Of issuing the Commission.*

By the statutes concerning bankrupts, the power of issuing commissions being vested in the Lord Chancellor, Lord Keeper, or Lord Commissioners of the Great Seal, when a creditor finds himself under the necessity of obtaining such a commission, if he resides in town he must make an affidavit of his debt before a Master in Chancery, if in the country before a Master Extraordinary, and execute a bond to the Great Seal<sup>1</sup>: and upon such affidavit and bond being presented and answered by the Lord Chancellor, the creditor is said to have struck a docket. But unless the party striking the docket seals the commission in four days exclusive of the day of striking the docket, or orders the commission to be sealed at the next public seal, in case there shall be a public seal within seven days next after such docket shall be struck, or by a private seal within eight days after the striking of such docket, then any other creditor may strike a new docket, and sue out a commission<sup>2</sup>.

After the commission is sealed, the creditor is allowed fourteen days if it is to be executed in London, and twenty-eight days if the bankrupt resides forty miles from London, to prosecute such commission; and at the expiration of such limited times the commission is supersedable, if not duly prosecuted<sup>3</sup>.

*Of opening the Commission, and declaring the Party Bankrupt.*

When a commission has been sealed, one of the messengers in bankruptcy is to summon three of the commissioners to attend a private meeting, for the purpose of open-

<sup>1</sup> Wydown's Case, 14 Ves. Jun. 80.

<sup>2</sup> General Orders, 12th Feb. 1774; 29th Dec. 1806.

<sup>3</sup> General Order, 26th June 1793.

ing the commission; who, after having qualified themselves by personally administering to each other the oath directed by the statute, proceed to receive proof of the petitioning creditor's debt, the trading, and the act of bankruptcy. By a general order, 26th Nov. 1798, the petitioning creditor or creditors must appear before the commissioners for the purpose of proving his or their debts. And this order is to be so strictly adhered to, that the commissioners ought not to depart from it without the special order of the Lord Chancellor, even in cases where it is impossible for the creditor to attend. Witnesses must also be produced and examined before the commissioners to prove the trading and the act of bankruptcy<sup>1</sup>.

*Of the Power of the Commissioners to seize the Bankrupt's Property.*

Upon the party's being declared bankrupt, the commissioners are by the statutes 21 Jac. I. c. 19. s. 8. and 5 Geo. II. c. 30. s. 14. empowered to issue a warrant under their hands and seals for the seizure of the bankrupt's effects, books, papers, or writings in his custody or possession, and to break open the houses or places belonging to the bankrupt, in case of resistance, or not having the key of any door or lock, where any of his goods, &c. are, or are suspected to be.

But they cannot break open any but the bankrupt's house to search for his goods, &c.<sup>2</sup>

When goods have been sent by the bankrupt on board a ship to be conveyed to his correspondent abroad, the commissioners cannot seize and take them away without paying the freight, and indemnifying the master of the vessel against a bill of lading sent to the consignee<sup>3</sup>. But should the messenger proceed to make a seizure, even though such

<sup>1</sup> Cooke, B. L. 105.

<sup>2</sup> Anon. Show. 247.

<sup>3</sup> Molloy, 253. 2 Eq. Ca. Abr. 98.

seizure may be illegal, the forcibly turning him out of possession cannot be justified, but may be the ground of an attachment against the party using such force<sup>1</sup>.

*Of the Power of the Commissioners over the Bankrupt.*

The commissioners, if they have reason to apprehend that the bankrupt is making away with and concealing his effects, or preparing to depart the kingdom, to avoid surrendering, may summon him to appear before them to be examined immediately<sup>2</sup>; and in case he disobeys their summons, it is enacted by the statute 5 Geo. II. c. 30. s. 14. that upon certificate under their hands and seals that a commission is issued, and the person proved before them to be a bankrupt, any judge or justice of the peace in England or Wales is empowered to grant a warrant under his hand and seal to apprehend and commit him to the common gaol of the county where he is taken; there to remain till he is removed by order of the commissioners, or the major part of them, by warrant under their hands and seals.

But it is provided by the 15th section of the same statute, that if a bankrupt taken under such certificate, and the warrant thereon, shall within the time allowed by the statute submit to be examined, and in all things conform as if he had surrendered, such bankrupt shall have the benefit of the statute as if he had voluntarily surrendered.

If a bankrupt does not answer the questions put to him by the commissioners, to their satisfaction, they may commit him until he does comply<sup>3</sup>.

Formerly, if the bankrupt was in execution, the commissioners were obliged to attend him in prison to take his examination; but by the statute 49 Geo. III. c. 121. s. 13.

<sup>1</sup> Ex parte Titner, 1 Atk. 136. Ex parte Dixon, 8 Ves. 104.

<sup>2</sup> Ex parte Lingood, 1 Atk. 240.

<sup>3</sup> Ex parte Nelan, 11 Ves. Jun. 511.



the goaler or the keeper of the prison must, on the warrant of the commissioners, bring up a prisoner charged in execution, to be examined by them, in the same manner as is practised with respect to bankrupts in custody on mesne process.

*Of the Power of the Commissioners over other Persons.*

By the statute 1 Jac. I. c. 15. the commissioners are empowered to commit persons refusing to be sworn and make answer touching the bankrupt's estate and effects; and this power is adopted by the statute 5 Geo. II. c. 30. which further requires the party so examined to sign his examination taken before the commissioners.

But there does not appear to be any power to commit, in case a witness refuses to obey the commissioners' summons to prove the act of bankruptcy or the trading<sup>1</sup>. The defect, therefore, must be remedied by an application to the Great Seal<sup>2</sup>.

If a witness is prevented from attending the commissioners according to their summons, he must make it known to them, and obtain their allowance for the excuse, and must attend the next meeting of which he has notice<sup>3</sup>.

In the case of *Dyer v. Missing*<sup>4</sup>, it was held, that the commissioners had no power or authority to commit one suspected of detaining the bankrupt's effects, for not attending to be examined on the first summons: but this case has been since overruled in the court of King's Bench, in the case of *Battie v. Gresley* and others, in which it was held, that a warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the first summons<sup>5</sup>.

<sup>1</sup> Cooke, B. L.

<sup>2</sup> 1 Jac. I. c. 15. s. 10.

<sup>3</sup> *Ex parte Higgins*, 11 Ves. Jun. 8.

<sup>4</sup> 2 Bl. 1055.

<sup>5</sup> 8 East's Rep. 318.

No action will lie against commissioners for a commitment bad in consequence only of a formal defect in the warrant <sup>1</sup>. But an action of trespass will lie against them for committing a person for not answering improper questions, or for not acquiescing in a proper answer <sup>2</sup>.

The wife of the bankrupt cannot be examined against her husband touching his bankruptcy, or whether he had committed any act of bankruptcy, or how or when he became a bankrupt <sup>3</sup>. But the statute 21 Jac. I. authorizes commissioners to examine the wife touching any concealments of the goods, effects, or estate of the bankrupt.

The commissioners of bankrupt may issue process of contempt to compel an answer. They are a court of justice sufficient for the purpose of having their witnesses protected during their attendance *cundo et redeundo* <sup>4</sup>. This privilege also extends to persons who attend voluntarily, as to prove their debts, or the like <sup>5</sup>.

Witnesses attending commissions of bankrupt are entitled to such costs and charges out of the bankrupt's estate as the commissioners in their discretion shall think fit <sup>6</sup>. But a witness is bound to attend the summons of the commissioners, although he has not been tendered the expenses of the journey, unless he can prove that he was unable to bear the expenses of it <sup>7</sup>.

A witness is bound to give an account of what he knew of the bankrupt's effects, as well before as after the bankruptcy <sup>8</sup>. But a person examined before commissioners is not bound to answer any thing which tends to criminate himself <sup>9</sup>.

<sup>1</sup> *Bray's Case*, Comb. 391.

<sup>2</sup> *Miller v. Seare*, 2 Bl. Rep. 1141.

<sup>3</sup> *Ex parte James*, 1 P. Wms. 610.

<sup>4</sup> *Ex parte Stow*, 2 Bl. Rep. 1142.

<sup>5</sup> *Arding v. Fowler*, 8 T. R. 534.

*Ex parte King*, 7 Ves. Jun. 315.

<sup>6</sup> 1 Jac. I. c. 15. s. 11.

<sup>7</sup> *Battie v. Gresley*, 8 East's Rep. 318.

<sup>8</sup> *Bracy's Case*, 1 Ld. Raym. 99.

<sup>9</sup> Comb. 391.

The commissioners are also empowered by the 19th chapter, s. 9. of the 21st Jac. I., to examine upon oath, or by any other ways and means as to them shall seem meet, any person for the discovery of the truth and certainty of the several debts due to the creditors seeking relief under the commission.

*Of the Effect of the Commission.*

A commission of bankrupt has the effect of immediately vesting all the rights and possibilities of the bankrupt under the administration of the Lord Chancellor in bankruptcy; and when it has issued, and the party is declared a bankrupt, his death will not prevent the further execution of it<sup>1</sup>.

*Of the Costs of issuing out a Commission.*

By the statute 5 Geo. II. c. 30. s. 25. the petitioning creditor is directed at his own costs to prosecute the commission till assignees shall be chosen; and the commissioners at the meeting appointed for the choice of assignees are to ascertain such costs, and by writing under their hands to order the assignees to repay the same out of the first money or effects received or collected by them under the commission.

*Of the Remedy for maliciously suing out a Commission.*

If the commission appears to have been fraudulently or maliciously taken out, the Lord Chancellor, on petition of the party grieved, is empowered by the statute 5 Geo. II. c. 30. s. 25. to examine into the same, and assign to such person the whole or part of the penalty conditioned in the bond of the petitioning creditor, who may sue for the same

<sup>1</sup> 1 Jac. I. c. 15. s. 17. Backwell's Case, 1 Vern. 153. Ex parte Dewdney, 15 Ves. Jun. 494.

in his name. Or if the bankruptcy is a doubtful case, and the commission superseded, the Lord Chancellor may either direct an inquiry before a master of the damages sustained by the bankrupt, or a quantum indemnificatus upon an issue at law; and after the damages are settled, the court may, for the better recovery thereof, order the bond to be assigned <sup>1</sup>. But where a case is attended with any flagrant circumstances, the bond will be assigned without further inquiry. And it is competent to the Lord Chancellor, to order the petitioning creditor to pay the costs of suing out the commission, with the costs of the application <sup>2</sup>.

But notwithstanding a remedy is provided against maliciously suing out a commission by enabling the Lord Chancellor to assign the bond, or award a specific sum by way of damages, it has been held, that the bankrupt is not deprived of his remedy at common law by an action for damages, but may proceed by an action at law to obtain such redress for the injury he has sustained as a jury may think him entitled to <sup>3</sup>.

*Of the Evidence to support a Commission.*

The bankrupt cannot be a witness to support the commission, either by proving the petitioning creditor's debt, the trading, or the act of bankruptcy <sup>4</sup>. And no release will have that effect <sup>5</sup>.

Neither can a bankrupt be evidence to prove property in himself, or a debt due to his estate, unless he has obtained his certificate, and given a release to the assignees of his share in the surplus and the dividends <sup>6</sup>. But he may

<sup>1</sup> *Ex parte Gayter*, 1 Atk. 144.

<sup>2</sup> *Smithey v. Edmonson*, 3 East's Rep. 22. *Smith v. Broomhead*, 7 T. R. 300.

<sup>3</sup> *Brown v. Chapman*, 3 Bur. 1418.

<sup>4</sup> *Cross v. Fox*, 2 Hen. Bl. 279. *Ewens v. Gold*, Bul. N. P. 40.

<sup>5</sup> *Field v. Curtis*, 2 Str. 829. <sup>6</sup> *Russel v. Russel*, 1 Bro. C. C. 269.

be evidence against the assignees, to prove property in, or a debt due from another; for it is against his interest to diminish the estate <sup>1</sup>.

A bankrupt having obtained his certificate under a second commission even with a release, is not a competent witness to enlarge the fund; for in the event of his not paying 15s. in the pound under the second commission his future effects are liable <sup>2</sup>.

Declarations made by the bankrupt at the time of his bankruptcy in explanation of his own act may be received in evidence. An admission by him before his bankruptcy, of a debt due to another, is sufficient to charge his estate. If he has been absent from home, an admission by him that he had been abroad to avoid his creditors, is good evidence. Whatever he says before his bankruptcy is evidence explanatory of the act done by him <sup>3</sup>.

Creditors being obviously interested in the increase of the bankrupt's property, cannot, during the continuance of that interest, be admitted witnesses to enlarge the divisible fund <sup>4</sup>. They are therefore incompetent witnesses to increase the bankrupt's estate, unless they release their debt to the assignees <sup>5</sup>.

But from the case of *Williams v. Stevens* <sup>6</sup>, it appears that a creditor who has not proved his debt under the commission is a competent witness to support the commission, by proving the trading and the act of bankruptcy. So if a creditor has sold his debt, after proving it, he is a competent witness to support the commission, his interest being gone <sup>7</sup>.

<sup>1</sup> *Ewens v. Gold*, Bul. N. P. 43. *Butler v. Cooke*, Cowp. 70.

<sup>2</sup> *Kennett v. Greenwoollers*, Peake, N. P. C. 3.

<sup>3</sup> 5 T. R. 512. Bul. N. P. 40. 1 Esp. N. P. R. 334. Cas. temp. Hardwicke, 267.

<sup>4</sup> *Egglesham v. Lefevre*, 2 Vin. 11.

<sup>5</sup> *Koopes v. Chapman*, Peake, N. P. C. 19. *Ambrose v. Clendon*, Cas. temp. Hardwicke, 267.

<sup>6</sup> 2 Camp. N. P. C. 300.

<sup>7</sup> *Granger v. Furlong*, 2 Bl. Rep. 1273.



*Of a renewed Commission.*

If by the death of more than two of the commissioners, or any other cause, there are not a sufficient number to execute the commission, it must be renewed; upon which renewal only half the fees usually paid for granting a commission are payable<sup>1</sup>. And the commissioners under a renewed commission proceed from the stage which was left incomplete by the former<sup>2</sup>.

*6. Of a Joint Commission.*

It was formerly the practice, where there were several partners, to take out a joint commission against all and separate commissions against each at the same time; but this practice being found to be attended with double expense, and to occasion confusion with respect to the effects, it has been since discountenanced.

Therefore, where parties have been declared bankrupts under separate commissions, if it can be shown that the joint effects would be disposed of to better advantage, or that the bankrupt's estate would be benefited by prosecuting a joint commission, the Chancellor will, on petition, supersede the prior separate one<sup>3</sup>.

Where a joint commission issues, and there appear different sets of creditors, by a general order of the 8th March 1794, the commissioners are directed to cause distinct accounts to be kept of the joint and separate estates, and that each estate shall be applied exclusively in the first instance to the payment of its own respective debts, and that neither the joint creditors shall come upon the separate estate, nor the separate upon the joint: but should there be a surplus of either estate after paying its own re-

<sup>1</sup> 5 Geo. II. c. 30. s. 44.

<sup>2</sup> Cooke, B. L. 13.

<sup>3</sup> *Lx parte Hardcastle*, Cooke, B. L. 9.

spective creditors, then such surplus shall be appropriated to the payment of the other set of creditors. But as the assignment under a joint commission is of the whole estate of the partners, both separate and joint, the separate creditors are by the same order allowed to prove under a joint commission, for the purpose of receiving dividends from the surplus, if any, of the joint estate after the joint creditors are satisfied <sup>1</sup>.

Where there have been different partnerships, and a joint commission issues against the firm including all the partners, the creditors of each of the firms and of each partner must be paid out of the respective funds belonging to the estate which they have trusted ; and the surplus, if any, of either of the estates must be applied to some deficient fund <sup>2</sup>.

All the partners in a firm may become bankrupt together ; or one or more may become bankrupt while the others remain solvent. In the former case a joint commission issues ; in the latter, separate commissions against each individually <sup>3</sup>. Where a joint commission issues, all the partners must be included. And therefore, if under a joint commission only two or more of a partnership consisting of a greater number are found to have committed acts of bankruptcy, the commission is invalid <sup>4</sup>.

Neither can a joint commission be supported where one of the partners is an infant <sup>5</sup>, or a lunatic <sup>6</sup>.

But it is only the ostensible partners who are required to be included in a joint commission. Therefore, if a commission issues against the whole of an ostensible firm, the com-

<sup>1</sup> See *Hankey v. Garrett*, 3 Bro. C. C. 457. Ex parte Taitt, 16 Ves. Jun. 193.

<sup>2</sup> *Watson on Partnership*, 277.

<sup>3</sup> *Cullen, B. L.*

<sup>4</sup> *Allen v. Downes*, Willes, 474. n.

<sup>5</sup> Ex parte Henderson, 4 Ves. Jun. 163.

<sup>6</sup> Ex parte Layton, 6 *ibid.* 434.

mission cannot be invalidated by proving the existence of a secret and dormant partner <sup>1</sup>, unless the creditor had means of ascertaining his connexion with the firm <sup>2</sup>. Where the general word “Company” is part of the title of a firm, it is incumbent on the creditor to ascertain the members who constitute the partnership <sup>3</sup>.

To support a joint commission each of the partners must have committed an act of bankruptcy, and must be found a bankrupt <sup>4</sup>.

If, after a joint commission is issued against two or more partners, one of them should die, the commission may still proceed. But if one of the joint traders is dead at the time of taking out the commission, it abates and is absolutely void, because they must each be found bankrupt <sup>5</sup>.

#### *7. Of superseding a Commission.*

By the statute 5 Geo. II. c. 30. s. 24. if any bankrupt, after the issuing of the commission against him, pay to the person who sued out the same, or otherwise give or deliver to such person, goods or other satisfaction or security for his debt, whereby such person suing out such commission shall privately have and receive more in the pound in respect of his debt than the other creditors; such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed to be an act of bankruptcy, whereby, on good proof thereof, such commission shall be superseded.

There are many grounds on which a commission may be superseded. It may be superseded if taken out at the instance of the bankrupt <sup>6</sup>; or if there is not a good petition-

<sup>1</sup> *Ex parte Benfield*, 5 Ves. Jun. 424.

<sup>2</sup> *Ex parte Layton*, 6 Ibid. 434.

<sup>3</sup> Ibid.

<sup>4</sup> *Allan v. Hartley*, Cooke, B. I. 7.

<sup>5</sup> *Warrington v. Norton*, Forrest, 181.

<sup>6</sup> *Ex parte Moule*, 14 Ves. Jun. 602.

ing creditor's debt<sup>1</sup>; or if the petitioning creditor is an infant<sup>2</sup>; or if there is not a sufficient act of trading or of bankruptcy<sup>3</sup>; or if the bankrupt is an infant<sup>4</sup>; or that all the trading took place during infancy<sup>5</sup>; or if taken out against a *feme covert* upon a trading prior to her marriage<sup>6</sup>; or if not opened until a considerable time after it has been issued<sup>7</sup>.

In the case of a copartnership, a commission may be superseded if one of the partners was dead at the time of issuing the commission against the firm; or if the joint commission cannot be supported as to any one of those against whom it is sued out<sup>8</sup>.

A commission may also be superseded by the agreement and consent of all the creditors of a bankrupt who have proved their debts<sup>9</sup>. But the bankrupt himself will not be permitted to petition to supersede a commission until he has surrendered, even with the consent of all his creditors. He must first petition for leave to surrender, and then apply to supersede the commission<sup>10</sup>.

The circumstances under which an uncertificated bankrupt may petition to supersede a second commission against him, are, where a creditor who might have proved under the first is a petitioning creditor under the second. "I can also conceive," said Lord Eldon, "that the bankrupt might desire that the second commission might be superseded, if it was taken out under circumstances making it not expedient that it should remain ostensibly in force, if void at law; though the conduct of all the parties under the first com-

<sup>1</sup> *Ex parte Hylliard*, 1 Atk. 146.

<sup>2</sup> *Ex parte Barrow*, 3 Ves. Jun. 554.

<sup>3</sup> *Ex parte Bowes*, 4 *Ibid.* 168.

<sup>4</sup> *Ex parte Sydebotham*, 1 Atk. 146.

<sup>5</sup> *Ex parte Moule*, 14 Ves. Jun. 603.

<sup>6</sup> *Ex parte Mear and Wife*, 2 Bro. C. C. 265.

<sup>7</sup> *Ex parte Puleston*, 2 P. Wms. 545.

<sup>8</sup> *Cullen*, B. L. 441.

<sup>9</sup> *Ex parte Crisp*, 1 Atk. 134.

<sup>10</sup> *Ex parte Jones*, 8 Ves. Jun. 328. 11 *Ibid.* 409.

mission brought nothing forward that could be the foundation of objection against the bankrupt, the assignees, or the petitioning creditor under that commission<sup>1</sup>."

As to the time when a commission of bankruptcy may be superseded, it has been determined that it may be superseded at any time after the first meeting upon consent of all the creditors who have proved<sup>2</sup>.

The usual course of superseding a commission is for the Lord Chancellor to order a feigned issue to try the bankruptcy at law. But if the commission has been taken out fraudulently or maliciously, the Chancellor may either order a specific sum by way of damages to be paid by the petitioning creditor to the bankrupts, or assign the petitioning creditor's bond, and enable the bankrupt to recover the whole penalty of the bond<sup>3</sup>.

#### 8. *Of the Assignees.*

##### *Of a provisional Assignee.*

The statute 5 Geo. II. c. 30. s. 30. authorises the commissioners, immediately upon declaring the party a bankrupt, to appoint an assignee or assignees, and to make a provisional assignment to such assignee or assignees of the whole or part of the bankrupt's estate or effects, until a choice has been made of assignees at a meeting of the creditors. But as this practice is attended with expense, it has not been much used of late years. Where such provisional assignee has been appointed, and it is the pleasure of the creditors, at a meeting for the choice of assignees, that he should be removed, if he refuse or neglect, for the space of ten days next after notice given of the choice of assignees at a meeting of the creditors, and of their consent to accept the assignment of the bankrupt's estate and effects, signified to

<sup>1</sup> *Ex parte Lees*, 16 Ves. Jun. 474.

<sup>2</sup> *Ex parte Duckworth*, *Ibid.* 416.

<sup>3</sup> *Ex parte Gayter*, 1 Atk. 141.



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him by such assignees, by writing under their hands, to assign and deliver up all the estate and effects of the bankrupt come to his hands, such provisional assignee shall forfeit the sum of 200*l.*

### *Of the Election of Assignees.*

By virtue of the statute 5 Geo. II. c. 30. s. 26. the commissioners, after declaring a party a bankrupt, are to appoint a time and place for the choice of assignees, which usually takes place at the second meeting under the commission.

To be appointed assignee, it is not necessary that the party should be a creditor of the bankrupt<sup>1</sup>. And although a creditor, who has been a party to a deed of assignment of the bankrupt's effects, cannot be a petitioning creditor, it has been held that he may be an assignee under the commission sued out upon it by a third person<sup>2</sup>.

By the 27th section of the 5th Geo. II. no creditor can vote in the choice of assignees, unless his debt amounts to ten pounds or upwards.

Where a creditor cannot attend himself, the commissioners are required, by the 26th section of the same statute, to permit any person duly authorised by a letter of attorney from the creditor, on oath or affirmation being made of the due execution thereof, to vote in the choice of assignees instead of such creditor.

By the statute 49 Geo. III. c. 121. s. 14. no creditor who has brought an action or instituted a suit against a bankrupt for any demand which arose prior to the bankruptcy, or which might have been proved under the commission, can prove for any purpose whatever without relinquishing such action or suit.

<sup>1</sup> Ex parte Greignier, 1 Atk. 90.

<sup>2</sup> Jackson v. Irvin, 2 Camp. N. P. C. 48.

If a creditor make oath of a certain sum being due to him, he ought to be admitted to prove to that amount for the purpose of choosing assignees, unless there appear to the commissioners doubt of the fairness of the debt; and then he must be suffered to make a claim only, till he makes out his demand to their satisfaction<sup>1</sup>.

A new choice of assignees will not be ordered because creditors were abroad, and prevented by accident from voting in the choice<sup>2</sup>. But it may be otherwise if creditors were kept back by fraud<sup>3</sup>.

*Of the Nature and Duties of their Trust.*

As assignees are in the nature of trustees, if they employ an agent to receive or pay money on account of the bankrupt's estate, and he misapplies or embezzles it, the assignee will be liable to make it good to the creditors<sup>4</sup>, unless he has consulted the body of the creditors in the appointment of such person, or that he has employed him from necessity, or conformable to the common usage of trade<sup>5</sup>.

Assignees are answerable only for what each separately receives, and the misconduct of one assignee will not operate against his coassignee where he is not at all privy to the act<sup>6</sup>.

And notwithstanding the decision in *Cann v. Read*<sup>7</sup>, it has been held that a bonâ fide payment to one assignee is good, and will bind the estate, provided the coassignee did not express his dissent<sup>8</sup>.

Assignees have not a general power to prosecute suits in equity, or submit matters to arbitration: for this purpose they must have a meeting of creditors, on notice given to

<sup>1</sup> *Ex parte Simpson*, 1 Atk. 70.

<sup>2</sup> *Ex parte Greignier*, Ibid. 90.

<sup>3</sup> *Ex parte Surtrees*, 12 Ves. Jun. 10.

<sup>4</sup> *In re Litchfield*, 1 Atk. 86.

<sup>5</sup> *Ex parte Belcher*, Ambl. 218.

<sup>6</sup> *Prinrose v. Bromley*, 1 Atk. 88.

<sup>7</sup> 3 Ibid. 695.

<sup>8</sup> *Smith v. Jamieson*, 1 Esp. N. P. C. 114. *Bristow v. Eastman*, Ibid. 172.

that effect in the London Gazette, to consider of each particular suit, or each particular case for arbitration, before they can proceed therein<sup>1</sup>. And if the majority of the creditors in value at the meeting are against bringing the suit, &c. the assignees cannot do it. It is optional, however, to any creditor to do it at the peril of his costs<sup>2</sup>.

Assignees are not, however, restricted from bringing actions at law without the consent of the creditors; for the whole of the bankrupt's estate being vested in them by the assignment, as it was in the bankrupt himself, they have the same remedies to recover it as they in their discretion may think proper<sup>3</sup>.

Assignees must, by the statute 5 Geo. II. c. 30. s. 26. keep books of account of the bankrupt's estate, which every creditor has a right to inspect at all seasonable times. And by a general order, 8th March 1794, assignees under a joint commission are to keep distinct accounts of the joint and separate estates.

The assignees of a bankrupt stand in the same situation, and are subject to the same equities, as the bankrupt, and are bound by all acts fairly done by him<sup>4</sup>; for although the court will favour creditors as much as it can, it must be where they have a superior right to other persons<sup>5</sup>.

If the statute of limitations is pleadable against a bankrupt, his assignees may be barred by it; and the time is to be computed from the date of the original cause of action, and not from the date of the commissioners' assignment<sup>6</sup>.

It is the duty of the assignees to collect in the bankrupt's property with as much expedition as the nature of it will admit. But they are not bound to take all the property

<sup>1</sup> *Ex parte Whitechurch*, 1 Atk. 91.

<sup>2</sup> *Barnard. Rep.* 30.

<sup>3</sup> 2 Bl. Com. 485.

<sup>4</sup> *Row v. Dawson*, 1 Ves. 331. *Anderson v. Maltby*, 2 Ves. Jun. 255.

<sup>5</sup> *Brown v. Jones*, 1 Atk. 187.

<sup>6</sup> *Grey v. Mendez*, 1 Str. 555.

which

which belonged to the bankrupt<sup>1</sup>; they may make an election: but when they have elected, they cannot afterwards renounce that which they have adopted<sup>2</sup>.

It is the duty of the assignees to sell all the bankrupt's property as soon as it can be done with advantage; and if they neglect to dispose of it, the Chancellor, upon a petition of a creditor, will order a sale<sup>3</sup>. If the assignees, with the approbation of a considerable number of the creditors, defer the sale in the expectation of benefiting the estate, and any individual creditor call upon them to sell the same, they will be liable to make good any deficiency which may happen by their deferring the sale<sup>4</sup>.

Assignees are incapable of purchasing the bankrupt's property on their own account, without the consent of all the creditors. A purchase however made by an assignee will only be set aside conditionally, in case the resale of the estate by the assignee should produce more than he gave for it; and then he must account for such profit to the creditors<sup>5</sup>.

*When liable to Interest.*

By the 5 Geo. II. c. 30. s. 32. before the creditors proceed to the choice of assignees, the major part in value of the creditors present may, if they think fit, direct in what manner, how, and with whom, and where, the moneys arising by, and to be received from time to time out of, the bankrupt's estate shall be paid and remain until the same shall be divided amongst the creditors; and the assignees are to conform to such directions as often as 100*l.* shall be got in or collected.

<sup>1</sup> Bourdillon v. Dalton, 2 Esp. N. P. C. 233.

<sup>2</sup> Turner v. Richardson, 7 East's Rep. 335. and Broome v. Robinson, cited there.

<sup>3</sup> Ex parte Goring, 1 Ves. Jun. 163.

<sup>4</sup> Ibid. Ex parte Hughes, 6 Ibid. 617.

<sup>5</sup> Whicheote v. Lawrence, 3 Ves. Jun. 740. Ex parte Reynolds, 5 Ibid. 707. Ex parte Morgan, 12 Ibid. 6.

But as it frequently happened that no directions were given, and that bankrupts' estates were often improperly retained in the hands of assignees, who made use of the moneys in trade, and considerable losses were sustained by the creditors; it was enacted by the statute 49 Geo. III. c. 121. s. 3. that where the creditors omit such direction, the commissioners shall, immediately after the choice of assignees, and at the same meeting, direct such disposition of the bankrupt's property. And by section the 4th, if the assignees wilfully retain, or otherwise employ for their own benefit, any moneys belonging to the bankrupt's estate, the commissioners are directed to charge such assignees, in their accounts, interest upon such moneys, at the rate of 20*l.* per cent. per ann. for the time they have retained or employed the same. By the 6th section, if an assignee become bankrupt, being indebted to the estate of the bankrupt, of which he was assignee, in 100*l.* and upwards in respect of moneys received by him as assignee, and wilfully retained or employed by him for his own benefit, the certificate shall only discharge his person; but his future effects shall remain liable for so much of such debt as shall not be paid by dividends, together with lawful interest.

#### *Of the Removal of Assignees.*

By statute 5 Geo. II. c. 30. s. 31. the holder of the great seal is empowered, if necessary, to vacate assignments of bankrupts' estates, and order new assignments to be made of the debts, effects, and estate unreceived, and not disposed of by the then assignees, to other persons to be chosen by the creditors; and such new assignees are empowered to sue for the same in their own names, and to give discharges, &c. in the same manner as the old assignees were entitled to do. And the commissioners are to give notice, in the two Lon-  
don



don Gazettes that shall immediately follow, of the removal and new appointment, &c.

The causes of removal are the death or bankruptcy of the assignee<sup>1</sup>, making use of the bankrupts' property<sup>2</sup>, permitting improper expenses by the commissioners<sup>3</sup>, purchasing, or a coassignee permitting the same, an estate belonging to the bankrupt at a sale by auction<sup>4</sup>, or residing in a place so that the court has no power over him<sup>5</sup>.

### *9. Of the Assignment.*

#### *Of the Effect of the Assignment upon the Bankrupt's real and personal Property.*

By the statute 13 Eliz. c. 17. the commissioners, when a man is declared bankrupt, are empowered to dispose of all his lands and tenements which he had in his own right when he became bankrupt, or which shall descend or come to him by any means at any time afterwards, before such time as his debts shall be fully satisfied and paid, or otherwise agreed for; as also all lands and tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as he may lawfully part with,) or purchased with any other person upon secret trust for his own use; and by virtue of the same power they may cause the same to be appraised to their full value, and sell them by deed indented and enrolled; or they may divide them proportionably among the creditors. This statute expressly included not only free, but customary and copyhold lands, but did not extend to estates tail, further than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only

<sup>1</sup> General Order, 8th March 1794. *Ex parte Newton*, 1 Atk. 96.

<sup>2</sup> *Ex parte Halliday*, 7 Vin. Abr. 77.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ex parte Reynolds*, 5 Ves. 707. <sup>5</sup> *Ex parte Grey*, 13 Ves. Jun. 274.

an equitable reversion. To remedy this defect the statute 21 Jac. I. c. 19. was enacted ; by which the commissioners are empowered to sell or convey, by deed indented or enrolled, any lands or tenements of the bankrupt, wherein he shall be seized of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown. The statute moreover provided that such sale shall be good against all such issues in tail, remaindermen, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means ; and that all equities of redemption upon mortgaged estates shall be at the disposal of the commissioners, who are empowered to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. Also by this and a former act, 1 Jac. I. c. 15. all fraudulent or voluntary conveyances to defeat the intent of these statutes are declared void. The same statutes however enact, that no purchaser *bonâ fide* for a good and valuable consideration shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed, or that such voluntary conveyance shall have been made upon the marriage of any of the bankrupt's children, both the parties being of the years of consent<sup>1</sup>.

In the construction of the statute 13 Eliz. c. 7. as to the effect of the assignment upon a purchase to the use of the bankrupt, his wife and children, it has been determined, that where a man not a trader, and not indebted at the time, purchased lands and settled them to himself, and to his wife and son, and two years afterwards entered into trade and became a bankrupt, that the settlement was good against creditors<sup>2</sup>. But if a purchase is made by a trader in the joint names of himself and wife, and he afterwards becomes a bankrupt, it is void as against the creditors by virtue of

<sup>1</sup> 2 Bl. Com. 285.<sup>2</sup> *Crisp. v. Pratt*, Cro. Car. 548.

the statute 1 Jac. I. c. 15.<sup>1</sup> And the law is the same if the purchase is made with the wife's money, if it was previously received, and disposable by him as his own, and the receipt not connected with the purchase, nor bound by any agreement with the trustee<sup>2</sup>.

The effect of the assignment upon the personal property of the bankrupt is regulated by the statutes 34 and 35 Hen. VIII. c. 4. 13 Eliz. c. 7. 1 Jac. I. c. 15. 21 Jac. I. c. 19. 5 Geo. II. c. 30; by which it is enacted, that all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual possession, debts, contracts, or other choses in action. And it has been decided that the operation of these statutes extends to the property described therein, whether it be in England or elsewhere, provided there should be no positive law of the country where such property may happen to be, to the contrary<sup>3</sup>.

A right of action to recover real property<sup>4</sup>, or a legacy given to the bankrupt, either before his bankruptcy or the signing of his certificate by the Lord Chancellor<sup>5</sup>, is assignable by the commissioners. So if a trader before his bankruptcy lose money at hazard, the assignees may recover it against the winner<sup>6</sup>. And where a bankrupt entered into an agreement, that in case of his bankruptcy, or insolvency, the vendor should retake the goods, it was held, that if the order and disposition of them remained in the bankrupt, they would pass by the commissioners' assignment<sup>7</sup>. But if a person contracts with another for a chattel which is not in existence at the time of the contract,

<sup>1</sup> *Glaister v. Hower*, 9 Ves. Jun. 12.

<sup>2</sup> *Ibid.* 8 *Ibid.* 195.

<sup>3</sup> *Good*, 114.

<sup>4</sup> *Smith v. Coffin*, 2 Hen. Bl. 444.

<sup>5</sup> *Toulson v. Grant*, 2 Vern. 432. *Tudway v. Bourne*, 2 Bur. 716.

<sup>6</sup> *Branden v. Pate*, 2 Hen. Bl. 303.

<sup>7</sup> *Holroyd v. Gwynne*, 2 Taunt. 176.

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though he pays him the whole value in advance, and the other proceeds to execute the order; but before the chattel is delivered it is taken under an execution, the assignees of the buyer cannot recover it in trover against the sheriff; for a buyer acquires no property in a chattel till it is finished and delivered<sup>1</sup>.

If after assignment of a bankrupt's estate, a creditor knowing it, and residing in England, should attach the money of the bankrupt abroad, the assignees may recover it in an action for money received to their use<sup>2</sup>. But where the attachment is complete before the act of bankruptcy, the creditor attaching is entitled to hold the property attached against the assignees in diminution of his debt, and to prove for the residue under the commission<sup>3</sup>.

### *Effect of the Assignment upon Property in Possession of the Bankrupt, but belonging, by Conveyance, to third Persons.*

In the construction of the act 21 Jac. I. c. 19. s. 11. it has been repeatedly decided, that unless possession accompanies and follows an absolute conveyance of personal chattels, such conveyance is fraudulent and void<sup>4</sup>. The statute enacts, that wherever any trader makes a conveyance of his goods upon good consideration to another, and yet is left in the possession, order, and disposition of them, by the consent and permission of such other person, in the event of the insolvency of such trader, the goods so conveyed, but left in the possession, order, and disposition of the bankrupt, are assignable by the commissioners for the benefit of the creditors.

But a distinction exists between mortgages of real estates

<sup>1</sup> Mucklow v. Mangles, 1 Taunt. 318.

<sup>2</sup> Sill v. Worswick, 1 T. R. 694. Hunter v. Potts, 4 T. R. 182.

<sup>3</sup> Ex parte Le Mesurier, 8 Ves. Jun. 82.

<sup>4</sup> Edwards v. Harben, 2 T. R. 587. Bamford v. Baron, Ibid. 594. n. Jackson v. Irving, 2 Camp. N. P. C. 48.



and chattel interests in lands, and goods and other personal chattels. The possession and power of disposing of goods and personal chattels are the only evidences of ownership to which persons dealing with traders look; and therefore the statute is particularly directed to remedy the mischief arising from a trader's holding out a delusive responsibility to the world: but as to real estates, possession is not such an evidence as to induce creditors to rely <sup>1</sup>.

Where the property could not be absolutely delivered at the time of the contract, but the best delivery has been given that the circumstances and nature of the property would admit, it has been held, that the bankrupt had not such a possession of the goods as to entitle his assignees to them <sup>2</sup>.

Thus, in the case of ships at sea and their cargoes, it has been held, that a delivery of their proper documents and muniments, so as to enable the purchaser to reduce the property into possession upon the arrival of the ship in port, is a sufficient compliance with the statute <sup>3</sup>.

But to render this effectual as a delivery within the statute, possession must be taken immediately on the arrival of the ship <sup>4</sup>.

If a trader adversely retains possession of goods, so that the party entitled to them is obliged to sue him in a court of justice to obtain the possession, or to restrain him from disposing of the goods, in the event of his bankruptcy; such possession is not within the meaning of the statute, as it is clearly not with the consent and permission of the owner of the goods <sup>5</sup>.

<sup>1</sup> *Ryal v. Rowles*, 1 Atk. 168. *Gordon v. East India Comp.* 7 T. R. 228.

<sup>2</sup> *Manton v. Moore*, 7 T. R. 67. <sup>3</sup> *Brown v. Heathcote*, 1 Atk. 160.

<sup>4</sup> *Jones v. Gibbens*, 9 Ves. Jun. 410.

<sup>5</sup> *West v. Skip*, 1 Ves. Jun. 245.



*Effect of the Assignment upon the Property of others in the Possession of the Bankrupt.*

Where the bankrupt is in possession of the goods of another at the time of his bankruptcy, his possession of them will not amount to a possession within the statute 21 Jac. I. unless it is accompanied with a power to sell or dispose of them, or that the owner has been guilty of laches in letting them remain in the bankrupt's possession, so as to gain him a false credit from being reputed the owner<sup>1</sup>.

Where money, goods, or bills and notes have been deposited in a trader's hands, to be appropriated to a particular purpose, as money to pay over, goods until an opportunity offers for sale<sup>2</sup>, or a remittance of bills of exchange or promissory notes, to answer acceptances<sup>3</sup>, or to present for payment<sup>4</sup>, and and the trader becomes a bankrupt with such money, goods, or bills in his possession, and unapplied to the purpose for which they were deposited, they are not distributable under a commission of bankruptcy<sup>5</sup>. And the proceeds of goods or bills and notes deposited for a specific purpose, are also not subject to the assignment, while they can be identified from the general mass of the bankrupt's property<sup>6</sup>.

As to the effect of the assignment upon property in the possession of the bankrupt, as factor, see title Principal and Agent, ante.

When a trader is a trustee<sup>7</sup>, executor<sup>8</sup>, or administrator<sup>9</sup>, and becomes bankrupt, and at the time of his bankruptcy

<sup>1</sup> *West v. Skip*, 1 Ves. 243.

<sup>2</sup> *Ex parte Flynn*, 1 Atk. 185. *Collins v. Forbes*, 3 T. R. 316.

<sup>3</sup> *Hassel v. Smithers*, 12 Ves. Jun. 119.

<sup>4</sup> *Ex parte Oursel*, Amb. 297. <sup>5</sup> *Cooke*, B. L. 380.

<sup>6</sup> *Tooke v. Hollingworth*, 5 T. R. 227.

<sup>7</sup> *Copeman v. Gallant*, 1 P. Wms. 314.

<sup>9</sup> *Ex parte Llewellyn*, *Cooke*, B. L. 137.

<sup>8</sup> *Ex parte Marsh*, 1 Atk. 159.

has any property belonging to his cestui que trust or testator in his possession, which can be distinguished from the general mass of his own property, it will not pass to the assignees. And should the assignees have possessed themselves of such property, on an application of the creditors of the testator, the court will appoint a receiver for receiving and securing the testator's effects <sup>1</sup>.

*Effect of the Assignment on Property fraudulently delivered by the Bankrupt in Contemplation of Bankruptcy.*

Every disposition of property made by a bankrupt in contemplation of bankruptcy, to prefer a particular creditor, is fraudulent and void. Each case, however, must be determined on its own circumstances. But all questions of preference turn upon the act being complete before an act of bankruptcy committed, for then the property is transferred; otherwise an act of bankruptcy intervening, vests the property in the hands and disposal of the law <sup>2</sup>.

But where a trader under a threat or apprehension of legal process, or from the importunity of his creditor, delivers property to him, or gives him a power to receive it, the transaction is valid, even though the trader knew himself to be insolvent <sup>3</sup>.

But to render such a transaction valid, the act must have redeemed the trader from some present difficulty. For where a trader, being pressed for payment or security, gave his creditor a bill of sale of apparently the whole of his stock, and immediately absented himself, it was held to be a preference of a particular creditor in contemplation of bankruptcy <sup>4</sup>.

<sup>1</sup> *Ex parte Ellis*, 1 Atk. 101.

<sup>2</sup> *Harman v. Fisher*, Cowp. 123. *Rust v. Cooper*, Ibid. 629. *Martin v. Pewtress*, 4 Bur. 2477. *Alderson v. Temple*, Ibid. 2235. *Singleton v. Howel*, 2 Bos. and Pul. 283.

<sup>3</sup> *Cosser v. Gough*, 1 T. R. 156. *Crosby v. Crouch*, 2 Camp. N. P. C. 166.

<sup>4</sup> *Thornton v. Hargreaves*, 7 East's Rep. 544.

*Effect of the Assignment upon the Estate of the Wife.*

The assignees of a bankrupt are entitled to the same interest in the property of the wife as the bankrupt himself; and whatever property vested in the bankrupt, which he could himself assign or release, the assignees become entitled to by the commissioners' assignment.

Debts due to the wife *dum sola*<sup>1</sup>, or stock in the public funds<sup>2</sup>, or a chose in action<sup>3</sup>, or a mortgage to which the wife was entitled before her marriage<sup>4</sup>, are assignable by the commissioners under the commission.

But the necessary apparel of the wife and her children<sup>5</sup>, or a vested legacy not reduced into possession by the husband in his lifetime<sup>6</sup>, or the property of a feme covert, sole trader according to the custom of London<sup>7</sup>, or property given to the wife for her sole and separate use<sup>8</sup>, or if the wife is entitled to dower<sup>9</sup>, or if the bankrupt is considered as trustee of an estate settled to the separate use of the wife during life<sup>10</sup>, these will not pass by the commissioners' assignment.

And if the wife's property cannot be possessed by the assignees, without the intervention of a court of equity, the court will compel them to make a competent settlement upon her, before it will permit them to get possession of the property, unless the wife be previously properly provided for out of it<sup>11</sup>.

And when a settlement has been made, previous to the marriage, of part of a wife's property to her separate use, it

<sup>1</sup> *Miles v. Williams*, 1 P. Wms. 248.

<sup>2</sup> *Pringle v. Hodgson*, 3 Ves. 617.

<sup>3</sup> *Tudor v. Samyne*, 2 Vern. 270.

<sup>4</sup> *Bosvil v. Brander*, 1 P. Wms. 458.

<sup>5</sup> 5 Geo. II. c. 30. s. 1.

<sup>6</sup> *Gayner v. Wilkinson*, 2 Dick. 491.

<sup>7</sup> *Lavie v. Phillips*, 3 Bur. 1776.

<sup>8</sup> *Vandenanker v. Desbrough*, 2 Vern. 96.

<sup>9</sup> *Stone*, 163.

<sup>10</sup> *Tyrrel v. Hope*, 2. Atk. 557. *Bennet v. Davis*, 2 P. Wms. 316. *Lockyer v. Savage*, 2 Str. 946.

<sup>11</sup> *Jacobson v. Williams*, 1 P. Wms. 382. *Lumb v. Milnes*, 5 Ves. Jun. 517.

does not bar her claim to a further settlement out of newly acquired property<sup>1</sup>.

If a trader previous to his marriage covenant to settle specific lands upon his wife, and he becomes a bankrupt, and dies without performing the covenant, the court will compel the assignees of the husband to carry the settlement into execution<sup>2</sup>.

*Of the Effect of the Assignment upon Partnership Property.*

In the case of a joint commission, all the estate, both separate and joint, of the bankrupt partners, vests, by virtue of the assignment, in the assignees<sup>3</sup>.

Therefore if a partner in contemplation of bankruptcy deposit goods, as if purchased, with a third person for a creditor of the firm, such deposit being fraudulent, the goods will pass to the assignees under a commission against all the partners<sup>4</sup>.

But a disposition of partnership effects in the course of trade, for a valuable consideration and without fraud, by a solvent partner, after an act of bankruptcy by his copartner, but which was unknown to him, is valid; and if the solvent partner afterwards fail, the assignees cannot recover such effects from the vendee<sup>5</sup>.

Where only one partner of a copartnership is declared a bankrupt, the assignees of the bankrupt partner take all the separate property of the bankrupt<sup>6</sup>, and, from the time of the act of bankruptcy committed, become tenants in common with the solvent partners of all his interest in the part-

<sup>1</sup> *Burdon v. Dean*, 2 Ves. Jun. 607.

<sup>2</sup> *Jordan v. Savage*, 2 Eq. Ca. Abr. 102.

<sup>3</sup> *Bolton v. Puller*, 1 Bos. and Pul. 539.

<sup>4</sup> *Hague v. Rolleston*, 4 Bur. 2176.

<sup>5</sup> *Fox v. Hanbury*, Cowp. 445.

<sup>6</sup> *Ex parte Cobham*, 1 Bro. C. C. 576.

nership effects <sup>1</sup>. The assignees however take the share or interest of the bankrupt partner in the joint property, subject to all the rights of his copartners, and to the account to be taken between them as partners <sup>2</sup>.

Where one of three partners became a bankrupt, and the partnership consequently dissolved, and the solvent partners continued to carry on the trade with the capital as constituted at the time of the bankruptcy; the assignees of the bankrupt were held entitled, beyond an account and distribution of the stock, &c. to a participation of subsequent profits made by the solvent partners carrying on the trade with such capital <sup>3</sup>.

And as the assignees of a bankrupt partner take by the assignment the same interest as the bankrupt himself was entitled to at the time he became bankrupt; where one partner advanced part of his share of the expense of an adventure, and gave his notes for the remainder, which did not become due till after he had become bankrupt; it was held that the assignees were entitled to his full share of the profits of the adventure, although the note creditors received only a dividend under the commission, and that it was uncertain at the time of the bankruptcy whether the adventure would be attended with profit or loss <sup>4</sup>.

But if one of the partners embezzles part of the partnership effects, and becomes a bankrupt, the assignees are entitled only to the balance of the account after the partnership debts are paid, and the amount of the embezzlement has been deducted <sup>5</sup>.

Neither are the assignees under a separate commission of

<sup>1</sup> *Ex parte Hodgson*, 2 Bro. C. C. 5. *Ex parte Smith*, 5 Ves. Jun. 295. *Smith v. Oriell*, 1 East's Rep. 368. *Barker v. Goodair*, 11 Ves. 78.

<sup>2</sup> *Whitm. B. L.* 226.

<sup>3</sup> *Crawshay v. Collins*, 15 Ves. Jun. 218.

<sup>4</sup> *Smith v. De Sylva*, Cowp. 469.

<sup>5</sup> *Richardson v. Gooding*, 2 Vern. 293.



bankruptcy entitled to the effects of a solvent partner in the hands of third persons against his consent <sup>1</sup>.

Nor are the assignees under a commission of bankruptcy against one of two partners entitled to the effects of the other, where two persons engaged in different trades entered into partnership in their respective trades, but on a dissolution of the partnership mutual releases of all demands were given by each partner, who took upon himself the payment of the debts due from his own trade <sup>2</sup>.

If upon a fair and open dissolution of the partnership, the retiring partner *bonâ fide* transfers his interest in the partnership effects to the continuing partners, who carry on the trade, and against whom a commission afterwards issues before all the joint creditors have been paid, all the effects of the old partnership found in specie amongst the property seized under the commission vest absolutely in the assignees; and even though there should be outstanding debts of the former firm unsatisfied, these effects so found in specie will not be considered as the joint estate of the former firm, either for the benefit of joint creditors, or the partner who has withdrawn <sup>3</sup>.

And in *ex parte Fell* <sup>4</sup>, where an outgoing partner assigned by deed his share of the stock to the remaining partners, and they and a surety covenanted that they would in due time discharge all the partnership debts, and indemnify the outgoing partner, and upon the bankruptcy of the remaining partners the outgoing partner was arrested by the creditors of the old partnership; upon petition he was held not to be entitled to have the specific stock and debts of the old partnership applied in satisfaction of the creditors of that partnership, in preference of the creditors of the new firm.

<sup>1</sup> *West v. Skip*, 1 Ves. 242.

<sup>2</sup> *Ex parte Titner*, 1 Atk. 136.

<sup>4</sup> 10 *Ibid.* 347.

<sup>3</sup> *Ex parte Ruffin*, 6 Ves. Jun. 119.

*Of the general Effect of Bankruptcy on the Property of the Bankrupt, and of others.*

By the act of bankruptcy, all the real and personal estate of the bankrupt is vested in the assignees, by relation, from the time of the act committed; so that the transactions of the bankrupt from that time are void, except in the cases provided for in the following statutes.

By the statute 1 Jac. I. c. 15. s. 14. it is provided, that no debtor of the bankrupt shall be endangered for the payment of his debt truly and bonâ fide made to any such bankrupt, before such time as he shall understand and know he has become a bankrupt.

By the statute 19 Geo. II. c. 32. it is provided, that no creditor of a bankrupt for goods sold, or upon bills of exchange, shall be liable to refund to the assignees any money received by him of the bankrupt upon such account, in the usual and ordinary course of trade and dealing, before such creditor knew, understood, or had notice, that he had become a bankrupt, or was in insolvent circumstances.

By the statute 21 Jac. I. c. 19. s. 14. it is provided, that no purchaser for a good and valuable consideration shall be affected by the bankruptcy of the vendor, unless the commission is sued out within five years after he shall have become a bankrupt.

And by the statute 46 Geo. III. c. 135. s. 1. it is enacted, that all conveyances by, all payments by and to, and all contracts and dealings by and with, any bankrupt, bonâ fide made and entered into more than two calendar months before the date of the commission, shall be valid, notwithstanding any prior act of bankruptcy, provided the person so dealing with the bankrupt had not at the time of such conveyance, &c. any notice of any prior act of bankruptcy, or that the bankrupt was insolvent or had stopped payment.

The

The third section of the act also declares, that the issuing of a commission, or the striking of a docket for that purpose, whether any commission actually issues thereon or not, is to be deemed a notice of a prior act of bankruptcy for the purposes of the act, provided it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission, or striking such docket. But by the statute 49 Geo. III. c. 121. s. 1. so much of the 46 Geo. III. as makes the striking of a docket notice of a prior act of bankruptcy is repealed.

In the construction of the 19 Geo. II. c. 32. it has been determined, that to bring payments made by a bankrupt, within the protection of the statute, they must be made in respect of goods sold, or bills drawn, &c. in the ordinary course of trade, as also without notice of an act of bankruptcy, and before the issuing of a commission. And therefore, in the construction of this act, it has been held, where money had been paid by a trader, after a secret act of bankruptcy, to a carrier, for the carriage of the trader's goods, that the payment was not within the statute, which was confined to payments made for goods, and payments of bills of exchange<sup>1</sup>.

So where A. recovered a verdict for a sum of money against B., who afterwards committed an act of bankruptcy; A., instead of entering up judgement and taking out execution, consented to take a bill for the amount drawn by B. on C. his debtor, which bill when it became due was duly paid by C. : it was held that this payment was not protected by the statute<sup>2</sup>.

But if a payment is made by a trader under an arrest, it has been held to be a payment in the usual and ordinary course of trade and dealing, and consequently within the

<sup>1</sup> Bradley v. Clark, 5 T. R. 197.

<sup>2</sup> Pinkerton v. Marshall, 2 Hen. Bl. 334.

protection of the statute, although such payment was made after he had committed a secret act of bankruptcy <sup>1</sup>.

And so will a payment made immediately to a creditor, who brings an officer with a writ into the trader's shop <sup>2</sup>.

But it appears that the act extends only to payments made by the bankrupt himself, or his authorised agent; and not to payments made by a third person upon compulsory process, or for the accommodation of the bankrupt. And therefore payment by a garnishee of money attached in his hands, is not protected by the statute <sup>3</sup>.

As to the effect of bankruptcy on bills of exchange and promissory notes, it has been held, that if a bankrupt, before his bankruptcy, assign to a creditor a debt or bill of exchange or note, for a valuable consideration, the assignment is protected by the statute of the 19th George the Second <sup>4</sup>. So if a trader, after a secret act of bankruptcy, indorse a bill of exchange to a creditor, payment of such bill before a commission is issued against the trader is within the statute <sup>5</sup>. And if a bill or note be not capable of delivery at the time, a transfer of it without delivery will be binding upon the assignees, provided notice of the assignment be given to the debtor <sup>6</sup>. But to render this effectual as a payment in the usual course of trade within the statute, the bill, &c. must, as soon as it is capable of a delivery, be delivered; otherwise, if it remains in the hands of the bankrupt, his assignees will be entitled to it <sup>7</sup>.

But if the holder of a bill of exchange give time to the acceptor, upon condition of receiving interest; payment of the bill after a secret act of bankruptcy has been decided not to be such a payment in the ordinary course of business as to come within the meaning of the statute <sup>8</sup>.

<sup>1</sup> *Holmes v. Winnington*, cited in 2 Bos. and Pul. 393.

<sup>2</sup> *Jones v. Lingard*, *Ibid.*

<sup>3</sup> *Hovil v. Browning*, 7 East's Rep. 154.

<sup>4</sup> *Grafie v. Greffulhe*, 1 Camp. N. P. C. 89.

<sup>5</sup> *Hawkins v. Penfold*, 2 Ves. 550.

<sup>6</sup> *Cullen*, B. L. 189.

<sup>7</sup> *Jones v. Gibbons*, 9 Ves. Jun. 410.

<sup>8</sup> *Vernon v. Hall*, 2 T. R. 648.



So where bankers having accepted bills for the accommodation of a trader, who after committing an act of bankruptcy, but before a commission was sued out, lodged money with them to take up the bills, which did not become due till after the commission was sued out, and then were regularly paid by the acceptors; it was held they were bound to refund the money which the bankrupt had lodged with them, and that they neither had a right of set-off under the 5th Geo. II. c. 30. nor could they protect themselves under the 19th Geo. II. c. 32. as having received the money in payment of bills of exchange in the ordinary course of trade <sup>1</sup>.

And if a banker, after notice of an act of bankruptcy committed by his customer, pays his draft <sup>2</sup>, or pays over any money to the bankrupt himself<sup>3</sup>, the assignees may recover the money; and he cannot set off such payment, nor be allowed to receive a dividend under the commission in the place of the creditor whose debt he paid, although such creditor's debt would have been proveable under the commission <sup>4</sup>.

As to payments made to a bankrupt, it has been decided, that if a trader after a secret act of bankruptcy consign goods to a factor, who agrees to advance money thereon, and accordingly accepts and pays bills drawn on him by the trader for their amount; the assignees of the bankrupt may recover from the factor the value of the goods; because the accepting and payment of the bills is not a payment of goods sold within the meaning of the statute <sup>5</sup>.

So if a broker, having goods of a trader under arrest in his possession for the purpose of sale, receives notice from the attorney of the future assignees not to sell them, as a

<sup>1</sup> *Tamplin v. Diggins*, 2 Camp. N. B. C. 312.

<sup>2</sup> *Vernon v. Hankey*, 2 T. R. 113.

<sup>3</sup> *Hankey v. Vernon*, 3 Bro. C. C. 313.

<sup>4</sup> *Hammersley v. Purling*, 3 Ves. Jun. 757.

<sup>5</sup> *Copland v. Stein*, 8 T. R. 199.



commission would shortly be issued against the trader, and that the act of bankruptcy would relate to the day when it was committed, which was some time past; if the broker notwithstanding sells the goods, and pays the money over to the trader before the expiration of the two months from the time of the arrest, it has been held that he is liable to repay the proceeds to the assignees<sup>1</sup>.

But if a debtor of a bankrupt, in consequence of a suit or a judgement at law, is compelled to pay his debt before the execution of an assignment under a commission of bankruptcy, although he had notice of an act of bankruptcy committed; the assignees cannot recover the money a second time from the debtor, unless they can prove fraud and collusion between him and the bankrupt<sup>2</sup>.

But notwithstanding by the act of bankruptcy all the bankrupt's property is vested in the assignees; yet it is an established principle of law, that they take it in the same situation, and subject to the same liens as it was affected in his hands, and they stand in his place, and are bound by all acts fairly done by him in relation to his property<sup>3</sup>.

As to judgements, statutes, executions, &c. it is provided by the statute 21 Jac. I. c. 19. s. 9. that all judgements, statutes, recognizances, attachments by the custom of London or any other place, against the lands or goods of a bankrupt, are void as against the assignees. But if such executions and attachments have been bonâ fide executed and levied more than two calendar months before the date and issuing of the commission, they are by virtue of the statute 49 Geo. III. c. 121. s. 2. valid, unless the creditor had notice of a prior act of bankruptcy, or that the bankrupt was insolvent or had stopped payment.

<sup>1</sup> King v. Leith, 2 T. R. 141.

<sup>2</sup> Foster v. Allanson, 2 T. R. 479.

<sup>3</sup> Cullen, B. L. 185.

10. *Of the Proof of Debts under the Commission.**What Debts are proveable.*

By the statute 46 Geo. III. c. 135. s. 2. it is enacted, that all persons with whom the bankrupt shall have bonâ fide contracted any debt, before the date and suing forth of the commission, which if contracted before any act of bankruptcy committed might have been proved under the commission, shall, notwithstanding any prior act of bankruptcy, be admitted to prove such debt, and be creditors under such commission, in like manner as if no such prior act of bankruptcy had been committed; provided such creditors had not, at the time such debt was contracted, any notice of any prior act of bankruptcy.

And by statute 7 Geo. I. c. 31. debts upon bills, bonds, notes, or other personal securities, but payable on a future day, are also proveable under a commission.

But as this statute was considered to be confined by the operation of the 5th Geo. II. c. 30. s. 22. to written securities, it was provided by the statute 49 Geo. III. c. 121. s. 9. that all persons who shall give credit upon good and valuable consideration bonâ fide, for any money whatsoever not due or payable at or before the bankruptcy of the person credited, shall be admitted to prove their debts under the commission, as if the same were payable presently, deducting a rebate of interest for what they receive, to be computed from the actual payment thereof, to the time such debts would become payable according to the terms upon which they were contracted.

So contingent debts, provided the contingency has taken place at the time of the bankruptcy, may be proved<sup>1</sup>.

But debts made void by statute, as being founded upon

<sup>1</sup> Ex parte East India Company, 2 P. Wms. 395. Tully v. Sparkes, 2 Str. 867. Ex parte Groome, 1 Atk. 114. Goddard v. Vanderheyden, 3 Wils. 270.

an usurious or other illegal consideration<sup>1</sup>, or for stock-jobbing transactions<sup>2</sup>, or for goods sent to India contrary to the charter of the company<sup>3</sup>.

*Of the Time of Proof.*

Formerly, creditors were not allowed to prove their debts, if at the time of their coming in to prove the same any part of the bankrupt's estate had been actually distributed; but now, except in cases of gross negligence, proof is allowed to be made at any time, while any thing remains to be divided<sup>4</sup>. And though, in strictness, a creditor who has neglected to prove his debt is entitled to be paid only future dividends *pari passu* with the other creditors; yet it is the practice to admit such creditor, if his delay was not fraudulent, but owing to accident or unavoidable circumstances, to be paid former dividends rateably with the other creditors, (provided former dividends are not thereby disturbed,) and then to receive dividends rateably with them<sup>5</sup>.

But in the case of a bill or note to which there are several parties, if proof is delayed until a dividend has been declared, though not paid, under one of the commissions, if the holder has not proved his debt under that commission, he cannot prove under commissions against the other parties for more than the residue, after deducting the amount he would have been entitled to under the dividend declared<sup>6</sup>.

*Of claiming a Debt.*

If a creditor cannot sufficiently ascertain or substantiate his debt, as where the agent of a creditor cannot produce

<sup>1</sup> *Benfield v. Solemons*, 9 Ves. Jun. 84. *Ex parte Skip*, 2 *Ibid.* 489. *Ex parte Mather*, 3 *Ibid.* 373.

<sup>2</sup> *Ex parte Bulmer*, 13 *Ibid.* 313.

<sup>3</sup> *Ex parte Moggridge*, *Cooke*, B. L. 187.

<sup>4</sup> *Ex parte Peachy*, 1 *Atk.* 111.

<sup>5</sup> *Ex parte Long*, 2 *Bro. C. C.* 50. *In re Wheeler*, 1 *Scho. and Lef.* 242. *Cooke*, 521.

<sup>6</sup> *Cooper v. Pepys*, 1 *Atk.* 106. *Ex parte Leers*, 6 Ves. Jun. 644.

his authority, it is usual for the commissioners to suffer a claim to be entered; which entitles the party to have a dividend reserved upon his claim, and to demand it as soon as his debt is ascertained, and his proof admitted <sup>1</sup>.

But if the claim is not substantiated in a reasonable time, it is the general practice for the commissioners to strike it out before a dividend is declared, unless sufficient reason is offered to them for prolonging the time. The creditor, however, is afterwards at liberty to prove his debt and receive his share upon any future dividends, on satisfactorily substantiating his claim <sup>2</sup>.

By statute 19 Geo. II. c. 32. s. 2. the obligee in any bottomry or respondentia bond, and the assured in any policy of assurance, bonâ fide made and entered into before the bankruptcy, on a good and valuable consideration, shall be admitted to claim under the commission, and to prove his demand, after the loss and contingency shall have happened.

*Of the Mode of Proof.*

The ordinary mode of proof is by oath of the creditor <sup>3</sup>. And by the statute 5 Geo. II. c. 30. s. 26. the commissioners are to admit the proof of any creditor's debt, who shall live remote from the place of meeting of the commissioners, by affidavit; or if the party be a quaker, by solemn affirmation. But to prove a petitioning creditor's debt, the creditor must be present before the commissioners <sup>4</sup>.

If the commissioners have just grounds to doubt the fairness of a debt, although the creditor has made a positive oath, they may reject it, or admit it only as a claim <sup>5</sup>. The party's remedy is by petition to the Lord Chancellor <sup>6</sup>.

And by the 29th section 5 Geo. II. c. 30. if any creditor

<sup>1</sup> Cooke, B. L. 255.

<sup>2</sup> Ibid.

<sup>3</sup> Cullen, B. L. 140.

<sup>4</sup> General Order, Nov. 26th 1798.

<sup>5</sup> Ex parte Simpson, 1 Atk. 70.

<sup>6</sup> Clark v. Capron, 2 Ves. Jun. 666.

perjure himself in swearing to or affirming a debt, he is guilty of perjury, and liable to pay double the sum so sworn or affirmed to be due or owing; which double sum is to be equally divided among all the creditors under the commission.

*Of the Creditor's Election, whether he will proceed at Law, or prove under the Commission.*

Before the statute 49 Geo. III. c. 121, a creditor might proceed at law, and also prove his debt under the commission, against the same party; or he might make a claim, and still proceed at law: but by the fourteenth section of that act it is enacted, that no creditor who has brought an action against a bankrupt shall be permitted to prove, or to make a claim for any purpose whatever, without relinquishing such action, and all benefit from the same; and that the proving or claiming of a debt under a commission of bankrupt shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed by him. Provided always, that such creditor shall not be liable to the payment to the bankrupt or his assignees of the costs of such action or suit which shall be so relinquished by him. And provided also, that where any such creditor shall have brought any action or suit against any such bankrupt jointly with any other person, his relinquishing such action or suit against such bankrupt shall not in any manner affect such action or suit against any other person.

This statute does not, however, affect the right of a creditor (not being the petitioning creditor), who has distinct demands, to prove one under the commission, and to proceed at law upon the other; as where a creditor has a bond debt, and another debt for rent<sup>1</sup>; or a note for one sum,

<sup>1</sup> Ex parte Botterill, 1 Atk. 109.



and a bond for another<sup>1</sup>. Or if he has a demand in right of his wife, and another due to himself<sup>2</sup>; or if one is a joint debt, and the other a separate one<sup>3</sup>.

And it has been held in the construction of this section, that if a creditor has both proved his debt under a commission of bankrupt, and commenced an action against the bankrupt before the passing of the statute, the statute does not compel him to relinquish his action<sup>4</sup>.

The being chosen assignee will not prevent the creditor from suing the bankrupt at law, if he has not proved his debt<sup>5</sup>.

And if a creditor has the bankrupt in execution at the time a commission issues against him, he may prove his debt under the commission upon condition of discharging the bankrupt out of execution; but such creditor cannot sue out a commission<sup>6</sup>.

But if after a commission has issued a creditor takes the bankrupt's body in execution, it is a conclusive election; and although he afterwards discharge the bankrupt out of custody, he will not be entitled to a dividend of the bankrupt's estate<sup>7</sup>.

It has been held that a landlord cannot distrain for rent and come in under the commission at the same time; but he must make his election either to waive his proof, or his distress<sup>8</sup>.

Neither can a creditor split an entire demand, and prove part under the commission, and sue the bankrupt at the same time<sup>9</sup>; and it seems that a creditor cannot adopt these

<sup>1</sup> Per Lord Eldon in *ex parte Grosvenor*, 14 Ves. Jun. 588.

<sup>2</sup> *Ex parte Matthews*, 3 Atk. 816.

<sup>3</sup> *Ex parte Stevens*, Cooke, B. L. 25.

<sup>4</sup> *Atherstone v. Huddleston*, 2 Taunt. 181.

<sup>5</sup> *Ex parte Ward*, 1 Atk. 152.

<sup>6</sup> *Ex parte Hicklin*, Cooke, B. L. 131.

<sup>7</sup> *Ibid. ex parte Knowell*, 13 Ves. Jun. 192.

<sup>8</sup> *Ex parte Grove*, 1 Atk. 104.

<sup>9</sup> *Ex parte Botterill*, 1 Atk. 109.

double remedies even upon separate notes, if given by the bankrupt in respect of the same transaction <sup>1</sup>.

*Of reducing and expunging Proof of Debts.*

If after a creditor has made his proof, it appears that it ought not to have been admitted, or at least not to the extent, the commissioners may, in pursuance of an order upon petition <sup>2</sup>, either reduce the proof, or expunge it altogether <sup>3</sup>.

But if since the proof was expunged circumstances have occurred so as to materially alter the state of the debt, the proof may be restored, in order that the party himself, or some third person, may have the benefit of the original proof, and receive dividends which would not otherwise be recoverable <sup>4</sup>.

Having stated the general nature of proof of debts under a commission of bankrupt, we shall now treat of the law relating to the proof of each particular description of debts.

*Of Creditors having a Mortgage or other Security.*

By the statute 21 Jac. I. c. 19. s. 9. no creditor having a security by judgement, statute, recognizance, &c. or having made attachments by the custom of London or elsewhere, shall be relieved for more than a rateable proportion with the other creditors, without respect to any penalty contained in the security, unless such judgements, &c. have been bonâ fide executed more than two calendar months before the date and issuing of the commission <sup>5</sup>.

When a creditor offers to prove his debt, he is obliged to state in his deposition whether he has a security or not; which if he has, he must either deliver up, or obtain an

<sup>1</sup> Ex parte Grosvenor, 14 Ves. Jun. 587.

<sup>2</sup> Ex parte Nixon, Mont. B. L. Append. 34.

<sup>3</sup> Ex parte Smith, Cooke, B. L. 124.

<sup>4</sup> Cooke, B. L. 151.

<sup>5</sup> 49 Geo. III. c. 121. s. 2.

order for the sale of; after which he may be admitted to prove for the deficiency<sup>1</sup>. So if a creditor abroad has by attachment or other process obtained a priority of payment out of the bankrupt's effects there, before he can be admitted to prove, he must abandon the priority he has obtained<sup>2</sup>. And if a creditor by a demand partly proveable, and partly not proveable, as from having been paid after the bankruptcy, has a security, he may apply it to the demand not proveable under the commission, and may be admitted a creditor for the proveable demand<sup>3</sup>.

But if a creditor has a joint security from the bankrupt and another person, he is not obliged to deliver up the security; but is entitled to receive dividends under the commission for such part as he may not have recovered from the co-security, provided that he does not receive more than twenty shillings in the pound upon the whole debt<sup>4</sup>.

A creditor who has a mortgage, or a pledge, if he is apprehensive that the security is not equal to the payment of his debt, may have the pledge sold. But the commissioners cannot order the property mortgaged or pledged to be sold, but upon an application of the creditor; for they have no power to dispose of a creditor's security without his consent.

If a security is deposited by a debtor generally to indemnify his creditor for a balance then due, and for such sums of money as shall be advanced to him, and at the time of the bankruptcy of the debtor the creditor has two demands, the one proveable under the commission, and the other not; he may apply his security, in the first place, to reduce that demand which is not proveable under the commission<sup>5</sup>.

<sup>1</sup> Ex parte Trowton, Cooke, B. L. 124.

<sup>2</sup> Ex parte Le Mesurier, 8 Ves. Jun. 82.

<sup>3</sup> Ex parte Hunter, 6 Ves. Jun. 94.      <sup>4</sup> Ex parte Bennet, 2 Atk. 527.

<sup>5</sup> Ex parte Hunter, 6 Ves. Jun. 94.

*Of Creditors by Annuities.*

By the statute 49 Geo. III. c. 121. s. 17. it is enacted, that it shall be competent to any annuity creditor of any person against whom a commission of bankruptcy shall issue after the passing of this act, whether the annuity shall be secured by bond or covenant, or bond and covenant, or by whatever assurance or assurances the same shall be secured, or whether there shall or shall not be or have been any arrears of such annuity at or before the time of the bankruptcy, to prove under such commission as a creditor for the value of such annuity, which value the commissioners shall have power and are hereby required to ascertain; and the certificate of every bankrupt under whose commission such proof shall be or might have been made, shall be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrears and future payments thereof, in the same manner as such certificate would discharge the bankrupt with respect to any other debt proved, or which might have been proved, under the commission.

*Of Creditors by Partnership.*

As all the stock and effects of the partnership are vested in all the partners, subject to their respective rights against each other, each partner is to be allowed against the other whatever he has advanced or brought into the partnership, and to charge his copartners with what they have not brought into, or have drawn out of the partnership funds beyond what they were entitled to. Therefore, where one partner is indebted to the firm of which he is a member, there is no doubt but that, if the firm continues solvent, they, or in case of their insolvency their assignees, may prove under a separate commission against their copartner a debt due to them  
by

by him<sup>1</sup>. But if the firm is called upon, after the bankruptcy of their copartner, to pay more than their share of the partnership debts, they cannot prove such debt under the commission<sup>2</sup>.

Where, however, the firm is indebted to one of the partners, he cannot be a creditor upon the same footing and in competition with the joint creditors; he can only have satisfaction out of the surplus which shall remain after the joint creditors are paid<sup>3</sup>. And in case of such partner's insolvency, the law is the same with respect to the assignees; they can be admitted to prove on the surplus only<sup>4</sup>.

If money is paid by a solvent partner to another, who afterwards becomes a bankrupt, for the purpose of being paid over to creditors as his liquidated share of the joint debts, and the bankrupt partner does not apply the same for that purpose, the solvent partner may prove the amount under the commission against his bankrupt partner; and that although the solvent partner did not pay the debts to the joint creditors until after the bankruptcy<sup>5</sup>.

Where one partner has, either with or without the consent of his copartner, taken more than his share out of the partnership funds, the joint creditors cannot be admitted to prove against the separate estate of the partner who drew out the money, until his separate creditors are satisfied; unless it can be shown that such partner took the joint property with a fraudulent intent to augment his separate estate<sup>6</sup>.

Where there are several partners constituting one firm, and some of them carry on a distinct trade, and in such character deal with and become creditors of the other firm,

<sup>1</sup> *Craven v. Knight*, 2 Chan. Rep. 226.

<sup>2</sup> *Wright v. Hunter*, 1 East's Rep. 20.

<sup>3</sup> *Ex parte Hunter*, 1 Atk. 227. <sup>4</sup> *Ex parte Burrell*, Jan. 22d, 1783

<sup>5</sup> 5 Ves. Jun. 792.

<sup>6</sup> *Ex parte Batson*, Cooke, B. L. 534. *Ex parte Cust*, Ibid. 535.



and a joint commission issues, proof may be made of such debt as if they dealt with strangers<sup>1</sup>.

But if the concern carried on by one partner is merely a branch of the joint concern, proof will not be permitted<sup>2</sup>.

### *Of Apprentices.*

An apprentice is only entitled to come in as a creditor under the commission for the residue of the premium paid to his master, after deducting a proportionate part for the time he lived with the bankrupt<sup>3</sup>.

### *Of Creditors by Award, Bonds, Bills of Exchange and Promissory Notes, or Debts payable at a future Day.*

If an award be made before bankruptcy, it creates a debt at law which may be proved under the commission<sup>4</sup>.

A creditor by bond is entitled to prove his demand against all the parties to it, and to receive dividends upon the whole sum from each estate, until he receives twenty shillings in the pound. But if he has received any part of the debt before he proves under the commission, he can only prove and receive dividends for the residue due to him<sup>5</sup>.

By the statute 7 Geo. I. c. 31. s. 1. bills of exchange and promissory notes; although not due and payable at the time of issuing a commission, are proveable under it, deducting a rebate of interest after the rate of five per cent. per ann. for what the creditor shall receive, to be computed from the actual payment to the time such bills, &c. would have become due and payable.

But bills founded on an usurious or other illegal conside-

<sup>1</sup> Ex parte Johns, Cooke, B. L. 538. , Ex parte St. Barbe, 11 Ves. Jun. 413.

<sup>2</sup> Ex parte St. Barbe, 11 Ves. Jun. 413.

<sup>3</sup> Ex parte Sandby, 1 Atk. 149.

<sup>5</sup> Ex parte Wildman, 1 Atk. 109.

<sup>4</sup> Baker's case, 2 Str. 1152.

ration<sup>1</sup>, or on an illegal contract<sup>2</sup>, if defective as to form<sup>3</sup>, or invalid as to the mode of acceptance or transfer<sup>4</sup>, are not proveable under a commission.

So if the holder of a bill has been guilty of such laches or conduct as would have discharged the party at law if he had continued solvent<sup>5</sup>, or that the statute of limitations has begun to operate on the bill<sup>6</sup>, he is equally precluded from proving under a commission.

But where the consideration of a bill is partly bad and partly good, the bill to the extent of the good consideration may be proved under a commission<sup>7</sup>.

And where a bill given for an antecedent debt is invalid on account of usury, or otherwise, the antecedent debt may be proved under a commission<sup>8</sup>.

Where there are several parties to a bill of exchange or promissory note, the holder is entitled to prove against all the parties to it under their respective commissions, and to receive dividends under each commission upon the whole amount, until he has received twenty shillings in the pound<sup>9</sup>; or such holder may prove it under **one or more** commissions against some of the parties, and **proceed at law** against the others<sup>10</sup>. And if the holder, after **having proved** the whole amount of the bill, receives a **part of the amount** from any one of the parties to it, he is **nevertheless** entitled to receive dividends upon the whole bill from the estates of the other parties, provided such dividends do not exceed twenty shillings in the pound upon the remainder of the bill<sup>11</sup>. But if he has received any payment or composition pre-

<sup>1</sup> *Ex parte Skip*, 2 Ves. Jun. 489. *Ex parte Mather*, 3 *Ibid.* 373.

<sup>2</sup> *Ex parte Bulmer*, 13 *Ibid.* 313.

<sup>3</sup> *Ex parte Adney*, Cowp. 460.

<sup>4</sup> *In re Barrington*, Scho. and Lef. 112.

<sup>5</sup> *Ex parte Wilson*, 11 Ves. Jun. 410.

<sup>6</sup> *Ex parte Dewdney*, 15 *Ibid.* 479.

<sup>7</sup> *Ex parte Mather*, 3 *Ibid.* 373.

<sup>8</sup> *Ex parte Blackburne*, 10 *Ibid.* 206.

<sup>9</sup> *Ex parte Wildman*, 1 Atk. 109. *Ex parte Bloxam*, 6 Ves. Jun. 443.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Cooper v. Pepys*, 1 Atk. 106.

vious to the time of his applying to prove, he can only prove for so much as remains due upon the bill <sup>1</sup>.

A bill drawn by way of accommodation, though it cannot be proved as between the parties to the accommodation, yet it may be proved by a *bonâ fide* holder against all parties, whether they have received value or not <sup>2</sup>.

In the case of accommodation acceptances, if cross paper has passed between the parties for their mutual accommodation, the holder may prove it under a commission of bankruptcy, before he has taken up his own or been damaged <sup>3</sup>.

There is a material difference, however, between the right of such a party to a bill to prove it, and that of a person who has actually advanced a valuable consideration for the bill. The latter is entitled to prove and receive a dividend immediately <sup>4</sup>; but the dividends will be withheld from the former till his own paper has been paid <sup>5</sup>.

So where a party to an accommodation bill or note receives from the party accommodated, another bill or note by way of indemnity, he will be entitled to prove and receive a dividend immediately upon such counter security, though the debtor becomes a bankrupt before such counter security is payable, and before the surety himself has been called upon such accommodation bill or note <sup>6</sup>.

But to create a debt capable of being proved in consequence of a counter security of this nature, the security must be a bill, note, or bond, payable at all events: an undertaking from the drawer to indemnify the acceptor, or a receipt for his acceptance, will not have that effect <sup>7</sup>.

<sup>1</sup> Cooke, B. L. 150.

<sup>2</sup> *Ex parte Marshall*, 1 Atk. 130.

<sup>3</sup> *Ex parte Clanricarde*, Cooke, B. L. 160. *Buckler v. Buttivant*, 3 East's Rep. 72.

<sup>4</sup> *Ex parte King*, Cooke, B. L. 157.

<sup>5</sup> 1 Mont. B. L. 139.

<sup>6</sup> *Ex parte Maydwell*, Cooke, B. L. 157.

<sup>7</sup> *Vanderhayden v. De Paiba*, 3 Wils. 528. *Ex parte Metcalfe*, 11 Ves. Jun. 404.

And it is the practice, where there are cross demands between the surety and the bankrupt upon counter paper, to suspend the dividends until it appears what the surety actually pays, and how far he exonerates the bankrupt's estate from his own paper<sup>1</sup>.

If a person has accepted a bill in consideration of the drawer's accepting a cross bill, and it is understood that each party shall pay his own acceptances, he cannot prove under a commission against such drawer any payment made on his own acceptance, either before or after the bankruptcy of the drawer. And therefore where cross paper had passed between two houses for mutual accommodation, and both became bankrupt, and the assignees of one house petitioned to prove against the estate of the other, bills that were outstanding and capable of proof against both estates; it was held, that as between the two estates no proof could be made in respect of the unsatisfied bills in the hands of either party, but that they must be excluded from the account<sup>2</sup>.

As to the proof of debts payable at a future day, as the statute 7 Geo. I. was considered to be confined by the operation of the 5th Geo. II. c. 50. s. 22. to written securities only, and not to extend to debts for goods sold upon credit merely, it was enacted by the statute 49 Geo. III. c. 121. s. 9. that all persons who shall give credit upon good and valuable consideration, *bonâ fide*, for any money whatsoever not due or payable at or before the bankruptcy of the person credited, may prove their debts under the commission, as if the same were payable presently, deducting a rebate of interest for what they receive, to be computed from the actual payment thereof to the time such debts would become payable, according to the terms upon which the same were contracted.

<sup>1</sup> Cullen, B. L. 134.

<sup>2</sup> *Ex parte Walker*, 4 Ves. Jun. 273. *Ex parte Earle*, 5 *ibid.* 833.

As the preamble of the statute 7 Geo. I. recites only “securities for the sale of goods and merchandize,” a question arose, whether securities given upon any other account were within the meaning of the act? and it was decided, that the statute is not merely confined to securities for goods sold and delivered in the course of trade, but that it extends generally to all personal securities for a valuable consideration, where the time of payment is certain, though postponed to a future day <sup>1</sup>.

### *Of Creditors by Composition.*

If a creditor agrees with his debtor to take a composition to be paid by instalments, and after payment of the first instalment the debtor becomes bankrupt, the creditor may prove the whole amount of his original debt, after deducting the instalment so paid <sup>2</sup>.

### *Of Contingent Debts.*

Debts depending upon a contingency which has not taken place at the time of the bankruptcy, cannot be proved under a commission of bankrupt <sup>3</sup>.

### *Of Creditors of a Bankrupt Executor or Trustee.*

As an executor acts in *auter droit*, his bankruptcy does not take away the right of executorship <sup>4</sup>. And whatever property the bankrupt may possess as executor or trustee, whether in effects or money, which can be distinguished from his own, is not affected by the commissioners' assignment <sup>5</sup>; unless he is beneficially entitled to any part of the

<sup>1</sup> Swaine v. De Mattos, 2 Str. 1211. Brooks v. Lloyd, 1 T. R. 189.

<sup>2</sup> Ex parte Bennet, 2 Atk. 527.

<sup>3</sup> Ex parte East India Company, 2 P. Wms. 396.

<sup>4</sup> Ex parte Ellis, 1 Atk. 191.

<sup>5</sup> Bennet v. Davis, 2 P. Wms. 318.



testator's property, and then his interest passes to his assignees<sup>1</sup>.

If the testator's property cannot be distinguished from the bankrupt's, proof must be made for the amount due to the testator's estate<sup>2</sup>.

*Of Creditors of Females Covert.*

If a woman be indebted, and she marries, her debts by the marriage become the debts of her husband, and may be proved under a commission of bankrupt against him<sup>3</sup>.

*Of Creditors by Insurance.*

By the statute 19 Geo. II. c. 32. s. 2. the obligee in any bottomry or respondentia bond, and the assured in any policy of insurance, bonâ fide made and entered into before the bankruptcy of the obligor in such bottomry or respondentia bond, or of the underwriter or assurer in such assurance upon a good and valuable consideration, shall be admitted to claim under a commission against the same; and after the loss or contingency shall have happened, to prove his demand, and receive a dividend proportionably with the other creditors, in like manner as if it had happened before the bankruptcy.

And by the statute 49 Geo. III. c. 121. s. 16. persons effecting a policy of insurance upon ships, goods, wares, merchandises, or other effects, with any person as a subscriber or underwriter, who is or shall become bankrupt, may prove any loss under the commission to which the bankrupt shall be liable, notwithstanding the person effecting such policy is not the person beneficially interested in such ships, &c. provided the person really interested is not in that part of the United Kingdom where the commission issued.

<sup>1</sup> Ex parte Butler, Ambl. 74.

<sup>2</sup> Ex parte Marsh, 1 Atk. 158.

<sup>3</sup> 1 Sch. and Lef. Rep. 473

*Of Creditors by Joint Debts.*

It is an established rule, that a creditor cannot prove against the joint estate of two bankrupt partners, and also against the separate estate of one of them, although he has distinct securities<sup>1</sup>. But he must make an election against which estate he will come in upon in preference; for he cannot prove against both estates so as to receive dividends at the same time<sup>2</sup>. When however he has made his election, if there should be a surplus from the estate which he rejected, he may come in upon that surplus<sup>3</sup>.

But though a creditor having distinct securities is obliged to make an election against which estate he will prove in preference, yet he is entitled to a sufficient time to examine the state of the different funds<sup>4</sup>; and may defer such election until a dividend is declared<sup>5</sup>. And even if he has received a dividend, the court will permit him to change his proof on refunding the dividend received<sup>6</sup>. But if the creditor has elected to prove under one estate, and a dividend has been made upon the other, the court will not permit the dividend to be disturbed<sup>7</sup>.

When the credit has been joint, the creditor may be admitted to prove under a commission against the joint estate, notwithstanding he has taken a separate security<sup>8</sup>.

And if money is lent on the separate notes or bills of different partners in the same firm, and is applied to the use of the partnership, the creditor may be admitted to prove against the joint estate, if the firm, when solvent, agrees to

<sup>1</sup> *Ex parte Bonbonus*, 8 Ves. Jun. 542.

<sup>2</sup> *Ex parte Banks*, 1 Atk. 107.

<sup>3</sup> *Ex parte Rowlandson*, 3 P. Wms. 405. *Ex parte Hay*, 15 Ves. Jun. 4.

<sup>4</sup> *Ibid.* <sup>5</sup> *Ex parte Clowes*, 2 Bro. C. C. 595.

<sup>6</sup> *Ex parte Rowlandson*, 3 P. Wms. 405.

<sup>7</sup> *Ex parte Beilby*, 13 Ves. Jun. 70.

<sup>8</sup> *Ex parte Brown*, cited in *Ex parte Hunter*, 1 Atk. 225.

consolidate the debts, and to consider them as partnership debts<sup>1</sup>.

So, on the other hand, when the credit has been separate, the creditor may be admitted to prove against the separate estate, notwithstanding he has taken a joint security<sup>2</sup>.

Where new partners are admitted into a firm, and the debts of the old firm are, with the consent of the new partners, acknowledged to be the debts of the new firm, on the bankruptcy of the new partnership the creditors of the old firm may prove as joint creditors of the new<sup>3</sup>.

If a partner, with the privity or consent of his copartners, apply to the purposes of the partnership money with which he is separately intrusted, (as money intrusted to him as an assignee under a commission of bankruptcy,) the debt may be proved against the joint estate, under a commission afterwards issued against the firm. But if money so separately intrusted has been applied to the purposes of the partnership without the consent or privity of the copartners, the debt can be proved only against the separate estate<sup>4</sup>.

If a partner signs the partnership signature to an instrument for his own private use, and the party taking it is aware of the transaction, he can only prove against the separate estate of such partner, unless his copartners adopt his act by a subsequent approbation<sup>5</sup>.

When the same partners are concerned in different trades, and the paper of one firm is given to the creditors of the other, such creditors have been permitted to take dividends from both estates<sup>6</sup>.

<sup>1</sup> *Ex parte Clowes*, 2 Bro. C. C. 595.

<sup>2</sup> *Ex parte Lobb*, 7 Ves. Jun. 592.

<sup>3</sup> *In re Staples and Co.* *Cooke*, B. L. 538.

<sup>4</sup> *Ex parte Apsey*, 3 Bro. C. C. 265.

<sup>5</sup> 8 Ves. Jun. 540.      <sup>6</sup> *Ibid.*

*Of Creditors by Marriage Articles.*

In questions whether the wife of a bankrupt, or her trustees, shall be admitted to prove money settled by marriage articles under a commission against the husband, it has been held, that if the debt was from its nature contingent and uncertain, and the contingency had not taken place at the time of the bankruptcy, it cannot be proved under the commission. Therefore, where a husband, by articles previous to marriage, covenanted, in consideration of marriage and a portion, to leave his wife a sum of money *in case she survived him*, and he became a bankrupt, it was decided that such a debt was not proveable under the commission<sup>1</sup>.

And where the contingency, as the death of the husband, has taken place after the bankruptcy, but before any distribution made of his estate, the wife or her trustees are not entitled to a dividend. In cases however of this nature, the court generally recommends the creditors to make some provision for the wife<sup>2</sup>.

*Of Creditors by Rent.*

While the goods remain upon the premises a landlord is entitled, notwithstanding a tenant becomes a bankrupt, to distrain for the whole arrears of the rent due to him. And though the messenger is in possession, if no assignment is made<sup>3</sup>; or if the assignment is made, and the assignees are in possession, the landlord's right to distrain still exists while the goods are on the premises<sup>4</sup>. And even after assignment and sale by the assignees, if the goods are not removed, the landlord may distrain for his whole rent<sup>5</sup>.

But if the goods have been sold by the assignees, and

<sup>1</sup> Ex parte Groome, 1 Atk. 114.

<sup>2</sup> Ex parte Greenaway, 1 Atk. 113.

<sup>3</sup> Ex parte Jacques, cited in Ex parte Plummer, 1 Atk. 104.

<sup>4</sup> Ex parte Dillon, *Ibid.*

<sup>5</sup> Ex parte Plummer, 1 Atk. 103.

taken off the premises, the landlord loses his remedy by distress, and can only come in under the commission *pro rata*, with the rest of the creditors <sup>1</sup>.

If a landlord distrains for arrears of rent, and also proves his debt under the commission, he must be put to his election to waive his proof or distress <sup>2</sup>. But whether a landlord's right to distrain for arrears of rent is barred by proving the debt under the commission, has not been determined, although the words of the statute 49 Geo. III. c. 121. seem sufficiently comprehensive for that purpose.

### *Of Sureties.*

As to the proof by a surety who has no counter security to indemnify him, it is provided by the statute 49 Geo. III. c. 121. s. 8. that "in all cases of commissions of bankrupt already issued, under which no dividend has yet been made, or under which the creditors, who have not proved, can receive a dividend equally in proportion to their respective debts without disturbing any dividend already made, and in all cases of commissions of bankrupts hereafter to be issued, where at the time of issuing the commission any person shall be surety for, or be liable for any debt of the bankrupt, it shall be lawful for such surety or person liable, if he shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends upon such proof; and when the creditor shall not have proved under the commission, it shall be lawful for such surety, or person liable, to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and to receive a divi-

<sup>1</sup> *Ex parte Descharmes*, 1 Atk. 103.

<sup>2</sup> *Ex parte Grove*, *Ibid.* 104.  
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dividend or dividends proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt after an act of bankruptcy had been committed by such bankrupt, provided that such person had not at the time when he became such surety, or when he so became liable for the debt of such bankrupt, notice of any act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment; provided always, that the issuing a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice; and every person against whom any such commission of bankrupt has been or shall be awarded, and who has obtained or shall obtain his certificate, shall be discharged of all demands at the suit of every such person having so paid, or being hereby enabled to prove as aforesaid, or to stand in the place of such creditor as aforesaid, with regard to his debt in respect of such suretyship or liability, in like manner to all intents and purposes as if such person had been a creditor before the bankruptcy of the bankrupt for the whole of the debt in respect of which he was surety, or was so liable as aforesaid.”

And if a creditor has proved the whole debt before he called upon the surety, the surety, or (in case he too has become a bankrupt, and his estate has paid dividends on account of the principal,) his assignees are entitled to have the benefit of his proof, and to receive dividends upon it<sup>1</sup>.

And to enable the surety to have the benefit of the statute, on his bringing the money into court, he may on a bill filed for that purpose compel the creditor to prove for his benefit<sup>2</sup>; which if the creditor should refuse to do, the court will stay his proceedings against the surety until he complies<sup>3</sup>.

<sup>1</sup> *Ex parte Ryswiche*, 2 P. Wins. 89. *Ex parte Turner*, 3 Ves. Jun. 243.

<sup>2</sup> *Wright v. Simpson*, 6 *Ibid.* 734. <sup>3</sup> *Phillips v. Smith, Cooke*, B. L. 211.

But this equity of the surety to stand in the place of the principal creditor, will not be permitted to operate to such creditor's prejudice : and therefore, where such creditor has any other distinct demand upon the bankrupt's estate, it has been held, that any diminution of his dividends upon such debt, occasioned by the surety's standing in his place and receiving dividends upon his proof, shall be made good to him by the surety out of such dividends <sup>1</sup>.

If the payment of the surety be after the bankruptcy of the principal, and before the creditor has proved his debt, it cannot be proved either by the creditor or by the surety ; for the creditor cannot prove, because he cannot swear to any existing debt ; and the surety cannot prove, because his payment is after the bankruptcy <sup>2</sup>.

### *Of Friendly Societies.*

For the encouragement and relief of friendly societies it is provided, by the statute 33 Geo. III. c. 54. s. 10. that if any person appointed to any office by any society regulated according to the provisions of this act, or being intrusted with, or having in his hands or possession, any moneys or effects belonging to such society, or any securities relating to the same, shall become a bankrupt, or insolvent, his assignees must, within forty days after demand made by the order of any such society, or the major part of them assembled at any meeting thereof, deliver over all things belonging to such society, to such person or persons as such society shall appoint, and pay out of the assets or effects of such person all such sums of money remaining due, which such person received by virtue of his said office, before any of his other debts are paid or satisfied.

But this provision of the legislature, in preferring the

<sup>1</sup> *Paley v. Field*, 14 Ves. Jun. 435.

<sup>2</sup> *Cooke*, B. L. 152.

claim of friendly societies to the claim of all other creditors, is not favoured<sup>1</sup>; for upon the construction of this act it has been decided, that the clause is confined to persons duly and formally appointed officers; and that it does not extend to a person to whom the money of the society has been paid as a banker, or to whom money has been lent by them upon security, bearing interest<sup>2</sup>. And in *ex parte Stamford Friendly Society*<sup>3</sup> it was held, that the preference given to friendly societies by the statute of the 33d Geo. III. over other creditors was confined to debts in respect of money in the hands of their officers, by virtue of their offices, and independent of contract; and that therefore money lent to a treasurer duly appointed, upon the security of his promissory note, payable with interest on demand, is not within the operation of the act, and therefore not entitled to a preference.

### *Of Interest.*

With respect to the proof of interest under a commission, it has been determined, that where by the custom of a trade, after accounts settled, interest is payable after a certain credit, such interest is proveable under a commission against the debtor<sup>4</sup>. But it is a rule for the commissioners never, in any case, to compute interest upon debts lower than the date of the commission<sup>5</sup>. And where the act of bankruptcy to which the commission relates is ascertained, no interest is allowed after that act<sup>6</sup>.

Where joint and separate commissions have been issued,

<sup>1</sup> *Ex parte Ross*, 6 Ves. Jun. 804.

<sup>2</sup> *Ex parte Ashley*, *Ibid.* 441. *Ex parte Amicable Society of Lancaster*, *Ibid.* 98.

<sup>3</sup> 15 *Ibid.* 280.

<sup>4</sup> *Ex parte Champion*, 3 Bro. C. C. 436. *Ex parte Hankey*, 3 Bro. C. C. 501. *Ex parte Mills*, 2 Ves. Jun. 295.

<sup>5</sup> *Ex parte Bennet*, 2 Atk. 527. *Butcher v. Churchill*, 14 Ves. Jun. 573.

<sup>6</sup> *Ex parte Moore*, 2 Bro. C. C. 597.

and

and an order obtained for keeping distinct accounts, neither set of creditors will be entitled to interest upon their debts out of the surplus, until the other set have received 20s. in the pound <sup>1</sup>.

It has been decided, that note creditors are not entitled to prove interest upon them, unless it has been expressly reserved in the body of the note, or that there is a special contract or agreement between the parties to that effect, or that it is the known and established custom to allow it <sup>2</sup>.

But in all cases where the bankrupt is entitled to a surplus, if there is an actual contract for interest appearing either on the face of the security, or by evidence, creditors will be entitled to it, up to the actual time of payment, without regard to the date of the commission <sup>3</sup>.

The difference upon the re-exchange of bills protested, and redrawn before the bankruptcy, or the costs and charges of protesting bills incurred before the bankruptcy, are proveable under a commission <sup>4</sup>. But if incurred after the bankruptcy, they cannot in either case be proved, unless they are fixed at a particular rate, by express stipulation, or by the particular law of the country from which the bill is drawn <sup>5</sup>.

*Of Costs and Damages.*

From the cases on this head, it appears, that if a verdict has been obtained before a commission is issued, though judgement is not signed till after, the costs incurred in such action are proveable under the commission <sup>6</sup>.

<sup>1</sup> Ex parte Boardman, Cooke, B. L. 181.

<sup>2</sup> Ex parte Champion, 3 Bro. C. C. 436. Ex parte Hankey, Ibid. 504. Ex parte Mills, 2 Ves. Jun. 295. And see Parker v. Hutchinson, 3 Ves. Jun. 134.

<sup>3</sup> Ex parte Hankey, 3 Bro. C. C. 504. Ex parte Goring, 1 Ves. Jun. 170. And see Ex parte Hill, 11 Ibid. 654. Butcher v. Churchill, 14 Ibid. 573.

<sup>4</sup> Cullen, B. L. 101, 102. <sup>5</sup> Ibid.

<sup>6</sup> 2 Bl. Rep. 1317. 1 Hen. Bl. 29. 3 Bro. C. C. 46. 5 T. R. 365. 6 Ibid. 282. 1 Bos. and Pal. 131.

But if a verdict and judgement be obtained after the bankruptcy, the costs cannot be proved as a debt under the commission<sup>1</sup>.

If a demand in the nature of damages be capable of being liquidated and ascertained at the time of the bankruptcy taking place, so that a creditor can swear to the amount, he may prove it as a debt under the commission<sup>2</sup>.

But if the damages be contingent and uncertain, as in cases of torts, and in many cases of demands founded upon contracts, which are uncertain both as to their amount, and whether a jury will give any damages, they cannot be proved under a commission<sup>3</sup>.

### 11. *Of Mutual Credit and Set-off.*

By the statute 5 Geo. II. c. 30. s. 28. it is enacted, that where it shall appear to the commissioners, that there has been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively.

And by the statute 46 Geo. III. c. 135. s. 3. it is enacted, that in all cases where there has been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit

<sup>1</sup> Ex parte Hill, 11 Ves. Jun. 646.

<sup>2</sup> Johnson v. Spiller, Doug. 167.

<sup>3</sup> 3 Wils. 272. Doug. 562. 6 T. R. 695. Ibid. 489. 1 H. Bl. 29.



was given to, or the debt was contracted by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed; provided such credit was given to the bankrupt two calendar months before the date and suing forth of such commission, and provided the person claiming the benefit of such set-off had not, at the time of giving such credit, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment.

It has been held, that the statute 5 Geo. II. relates not only to mutual debts, but also to mutual credits. And in the construction of this act, as also the 46th Geo. III. it has been determined, that no debt or credit can be set against another by way of set-off, unless both respectively accrued or were given before the bankruptcy, or two calendar months before the commission where there has been a second act of bankruptcy<sup>1</sup>. Thus where bankers having accepted bills for the accommodation of a trader, who after committing an act of bankruptcy, but before a commission was sued out, lodged money with them to take up the bills which did not become due till after a commission was sued out, and were then regularly paid by the acceptors; it was held that the bills could not be set off under the statute, but that the acceptors were bound to refund the money to the assignees<sup>2</sup>. Neither can a debt contracted after notice of an act of bankruptcy be set off<sup>3</sup>. Nor can a bill or note indorsed to the claimant after the bankruptcy<sup>4</sup>. But a creditor on a bill or note of the bankrupt's indorsed to him before the bankruptcy, may set it off against a debt due from him to the bankrupt for goods bought after the indorsement, and also before the bankruptcy<sup>5</sup>. So an accommodation acceptor, who has been ob-

<sup>1</sup> Cullen, 197.

<sup>2</sup> *Tamplin v. Diggins*, 2 Camp. N. P. C. 312.

<sup>3</sup> *Hawkins v. Penfold*, 2 Ves. Jun. 530.

<sup>4</sup> *Dickson v. Evans*, 6 T. R. 57.

<sup>5</sup> *Hanley v. Smith*, 3 T. R. 507.

liged to pay his acceptance after the bankruptcy of the party whom he accommodated, may set off such payment against a debt due from him to the bankrupt at the time of his bankruptcy<sup>1</sup>.

To constitute mutuality of debts or of credits, it is in general necessary, that the sum claimed was due to the bankrupt and is due to the creditor in their own respective rights. For a joint and separate debt cannot be set off against each other<sup>2</sup>.

### 12. *Of the Dividend.*

The statute 1 Jac. I. c. 15. s. 4. allows any of the creditors of a bankrupt, within four months after the commission is issued, and until distribution is made, &c. to join with the other creditors in partaking of the benefits of the commission; and if the creditors do not come in within four months, then the commissioners are empowered to distribute, &c.

With respect to the time when a dividend is to be made, the assignees are, by virtue of the statute 5 Geo. II. c. 30. s. 33. compellable after the expiration of four months, and within twelve months from the time of issuing the commission, to make a dividend or distribution of the bankrupt's estate and effects, and to cause at least twenty-one days notice to be given in the London Gazette, of the time and place the commissioners and assignees intend to meet for that purpose. And if the assignees, after the four months are elapsed, refuse to make a dividend, the Chancellor will, upon petition, order them to attend the commissioners at a meeting appointed for that purpose, who are to declare a dividend, if on examining the accounts, and the assignees on oath, they find there is a sufficient fund: or the commissioners may themselves, without any order of the court, summon the assignees to produce

<sup>1</sup> Smith v. Hodson, 4 T. R. 211.

<sup>2</sup> Ex parte Twogood, 11 Ves. Jun. 519.

their

their accounts, and show cause why a dividend should not be declared ; which summons and meeting for the assignees' attendance may be had without any expense, upon the application of a creditor who has proved his debt <sup>1</sup>.

By the statute 49 Geo. III. c. 121. s. 5. " For the purpose of ascertaining in what manner the money which shall from time to time come to the hands of such assignee or assignees has been employed, the commissioners shall in no case declare a dividend upon admission only of a certain sum in the hands of the assignees, but shall require such assignee or assignees to deliver upon oath a true statement in writing of all the sums of money received by such assignee or assignees, and when received by him or them respectively, and on what account, and how employed ; and shall examine such statement, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of such assignee or assignees respectively ; and shall inquire for what reason any sum appearing to be in the hands of such assignee or assignees ought to be retained ; and thereupon shall declare a dividend on the remaining sum, specifying in their order the sum so allowed to be retained, and the grounds on which they may conceive it proper that the same should be retained, and not divided amongst the creditors.

The assignees in pursuance of such order, and without any deeds of distribution for that purpose, must forthwith make such dividend accordingly, and take receipts in a book to be kept for that purpose ; and such order and receipt shall be a full discharge to the assignees, for so much as they shall fairly pay pursuant to such order <sup>2</sup>.

By the fourth section of the statute 49 Geo. III. c. 121. assignees wilfully retaining in their hands, or employing for

<sup>1</sup> *Ex parte Whitechurch*, 1 Atk. 91. Cooke, B. L. 521.

<sup>2</sup> 5 Geo. II. c. 30. s. 33.

their own benefit, any money, part of the estate of the bankrupt, shall be charged by the commissioners in their accounts with interest at the rate of 20*l.* per cent. per annum on all moneys so retained, during the time they so wilfully retain and employ the same.

If assignees neglect to make a dividend in proper time, they may be charged with interest, although the money has lain at a banker's, and they have not been paid interest for it<sup>1</sup>.

By the statute 5 Geo. II. c. 30. s. 37. within eighteen months next after the issuing of the commission, the assignees must make a second dividend, and cause a notice to be inserted in the London Gazette, of the time and place the commissioners intend to meet to make a second dividend, and for the creditors who shall not before have proved their debts to come and prove the same; and at such meetings the assignees shall produce upon oath (or, if quakers, upon affirmation,) their accounts of the bankrupt's estate; and what upon the balance thereof shall appear to be in their hands shall, by the like order of the commissioners, be forthwith divided among such of the bankrupt's creditors who shall have made due proof of their debts, in proportion to their several debts; which second dividend shall be final, unless any suit at law or in equity be depending, or any part of the estate standing out, that cannot be disposed of, or that the major part of the creditors shall not have agreed to be duly sold; or unless some other or future estate or effects of the bankrupt shall afterwards come to or vest in the assignees; in which case the assignees shall, as soon as may be, convert such future or other estate and effects into money, and shall within two months next after the same shall be converted into money, by the like order of the commissioners,

<sup>1</sup> Treves v. Townsend, 1 Bro. C. C. 384.

divide the same amongst such bankrupt's creditors who shall have made due proof of their debts under the commission.

If creditors have not been able to prove their debts in time to receive a first dividend, and they can reasonably account for the delay, such as by making an affidavit that they have not read the Gazette, the Chancellor will make an order that they be admitted to prove; and then they must, in the first place, be brought up equal to the creditors under the former dividend, before the commissioners can proceed to make a second, provided the former dividend be not disturbed by so doing<sup>1</sup>.

And it is the practice, without an order, to permit creditors who can reasonably account for their delay, to prove at a meeting convened for the purpose of declaring a dividend, and in the first place to direct them to be paid equal to those who had proved before, and then to direct a general distribution of the residue<sup>2</sup>.

### 13. *Of the Bankrupt.*

#### *Of his Conduct.*

When a trader has been declared a bankrupt, and notice thereof has been left at his usual place of abode, or personally served in case he is in prison, and after notice of the issuing of the commission, and of the time and place of the meeting of the commissioners, he must, under the penalty of death, surrender within forty-two days to, and submit to be examined by, the commissioners named in the commission, or the major part of them; provided that the commissioners appoint not less than three several meetings within the said forty-two days; and that the last meeting is on the forty-second day<sup>3</sup>.

<sup>1</sup> Ex parte Stiles and Pickart, 1 Atk. 203.

<sup>2</sup> Cooke, Bkpt. Laws, 521.

<sup>3</sup> 5 Geo. II. c. 30. s. 2.



But by the third section of the same statute, the Lord Chancellor, or the person holding the great seal, may enlarge the time for the surrender, &c. for any term not exceeding fifty days from the expiration of the said forty-two days, by an order made at least six days before the time on which the bankrupt was to surrender.

The omission to surrender must be wilful, to make it felony <sup>1</sup>. And therefore if the bankrupt is prevented from surrendering by illness <sup>2</sup>, or makes an attempt to surrender <sup>3</sup>, it will be a good defence if he should be tried for felony.

Where there does not appear any intention in the bankrupt of defrauding his creditors by not appearing within the time appointed, and when his absence proceeds rather from an ignorance of the consequence, or from accident, the Lord Chancellor will supersede a commission to prevent a prosecution for felony in not surrendering <sup>4</sup>.

After his surrender he is required by the statute 5 Geo. II. c. 30. s. 16. to attend the commissioners at all times till his affairs are finished, to be examined touching all matters relating to his trade, dealings, estate, and effects. The fourth section of the same statute also compels him to attend the assignees upon every reasonable notice in writing for that purpose given by such assignees, or left for him at his house or place of abode, in order to assist such assignees in making up, adjusting, or settling, any account or accounts between such bankrupt and any debtor to or creditor of his estate. He is moreover obliged to attend any court of record in order to be examined touching the same, or for such other business which such assignee shall adjudge necessary for getting in the bankrupt's estate for the benefit of his creditors. And in case of contumacy

<sup>1</sup> Ex parte Rogers, Ambl. 307.      <sup>2</sup> Ex parte Ricketts, 6 Ves. Jun. 415.

<sup>3</sup> Ex parte Grey, 1 Ves. Jun. 195.      Ex parte Higginson, 12 Ibid. 496.

<sup>4</sup> Ex parte Wood, 1 Atk. 222.

or that the bankrupt neglects or refuses to attend, or on such attendance shall refuse to assist in such discovery, without good and sufficient cause to be shown to the commissioners for such neglect or refusal, to be by them allowed as sufficient; the commissioners are empowered to commit the bankrupt until he shall conform to their satisfaction <sup>1</sup>.

After the time allowed to the bankrupt for the discovery of his property is expired, any person who shall voluntarily discover any part of the bankrupt's estate not before known to the assignees, either to the assignees or to the commissioners, shall be allowed 5*l.* per cent. upon the property discovered, and such further reward as the assignees and major part of the creditors at the next meeting shall think fit.

And any trustee, wilfully concealing the real or personal estate of the bankrupt, who does not within forty-two days after the issuing of the commission, and notice given in the Gazette, disclose his trust and estate in writing to one of the commissioners or assignees, shall forfeit 100*l.* and double the value of the property concealed, to be recovered by action of debt in the name of the assignees <sup>2</sup>.

*His Privilege from Arrest.*

A bankrupt is free from all arrests, restraints, or imprisonment of any of his creditors in coming to surrender, and from his actual surrender to the commissioners, for and during the forty-two days, or the further time for finishing his examination, provided he was not already in custody at the time of his surrender and submission to be examined; and if when coming to surrender he is arrested for debt or on an escape warrant, or if after his surrender he is so arrested within the time before mentioned, then on produ-

<sup>1</sup> Sect. 36.

<sup>2</sup> 5 Geo. II. c. 30. s. 20, 21.

cing the notice or summons under the hands of the commissioners or assignees, and making it appear to the officer that such notice is signed by the commissioners or assignees, and giving him a copy thereof, he shall be immediately discharged. In case the officer shall, after such production and notification, detain the bankrupt, he is liable to a penalty of 5*l.* for every day's detention <sup>1</sup>.

And if, after the bankrupt has passed his final examination, he is summoned by the commissioners to attend them on declaring a dividend, he is entitled to the privilege <sup>2</sup>.

But he is not privileged from arrest by virtue of an extent, even whilst under examination, for the crown is not bound by the bankrupt laws <sup>3</sup>.

Neither is he entitled to the privilege, if taken by his bail while under examination; for the statute 5 Geo. II. c. 30. s. 5. expressly excepts the case where a bankrupt is in custody at the time of his surrender and submission <sup>4</sup>.

A bankrupt is entitled to the privilege, although the debt upon which he is arrested is not proveable under the commission <sup>5</sup>. And every mode by which a creditor can arrest a bankrupt for a debt, whether in law or equity, comes within the protection of the bankrupt laws <sup>6</sup>.

### *Of his Examination.*

By the statute 5 Geo. II. c. 30. in conjunction with the statute 1 Jac. I. c. 15. the commissioners are empowered to examine the bankrupt on oath, (or if a quaker on affirmation,) as well by word of mouth as on interrogatories in writing, touching all matters relating to the trade, dealings, estate, books of account, effects, and such other things of the bankrupt, as may tend to disclose his estate or

<sup>1</sup> 5 Geo. II. c. 30. s. 5.

<sup>2</sup> *Arding v. Flower*, 8 T. R. 534.

<sup>3</sup> *Ex parte Dick*, cited 2 Bl. R. 1142.

<sup>4</sup> *Ex parte Gibbons*, 1 Atk. 238.

<sup>5</sup> *Darby v. Baughan*, 5 T. R. 209.

<sup>6</sup> 1 Sch. and Lef. Rep. 169.

transactions,

transactions, as they think fit. By virtue of the same statutes they may take down or reduce into writing the verbal examination of the bankrupt; which examination so taken down or reduced into writing, the bankrupt must sign under pain of being committed until he does sign it, unless he has a reasonable objection either to the wording of it, or otherwise, to be allowed by the commissioners.

And by the first section of the 5th Geo. II. the bankrupt is required to disclose and discover all his effects and estate real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times, he has disposed of, assigned, or transferred any of his goods, wares, merchandises, moneys, or other estate and effects, and all books, papers, and writings relating thereto, of which he was possessed, or in or to which he was any ways interested or entitled, or which any other person had in trust for him or for his use, at any time before or after the issuing of the commission; or whereby he or his family have or may expect any profit, possibility of profit, benefit, or advantage whatsoever; except only such part of his estate and effects as shall have been really and bona fide sold or disposed of in the way of his trade and dealings, and also such sums of money as shall have been laid out in the ordinary expenses of his family. He is also required to deliver up, on his examination, to the commissioners, all such part of his goods, wares, merchandises, money, estate, and effects, and all books, papers, and writings relating thereto, as at the time of his examination shall be in his possession, custody or power, the necessary wearing apparel of himself, his wife, and children, only excepted. And if he conceal any part of his property to the amount of twenty pounds, with intent to defraud his creditors, he is guilty of felony without benefit of clergy.

To enable a bankrupt to make a full discovery of his es-

tate and effects, by the 5th section of the same act, he is at all reasonable times before the expiration of the forty-two days, or the enlarged time, to inspect his books, papers, and writings, in the presence of his assignees, or some person appointed by them; and to take with him for his assistance such persons as he shall think fit, not exceeding two at any one time, and to make such extracts and copies as he shall think fit.

If the bankrupt is in prison, the assignees are required to appoint one or more persons to attend him from time to time, and to produce to him his books, &c. in order to prepare his last examination; a copy of which he must, on their application for it, deliver to the assignees, or their order, ten days at least before such last examination<sup>1</sup>.

By the 16th section of the same statute, in case the bankrupt refuses to answer or does not fully answer to the satisfaction of the commissioners, or the major part of them, all lawful questions put to him by them, or the major part of them, as well by word of mouth as by interrogatories in writing, the commissioners, by warrant under their hands and seals, may commit him to such prison as they may think fit, there to remain, without bail or mainprize, until such time as he submits to the commissioners, and makes full answer to their satisfaction to all such questions as shall be put to him as aforesaid.

#### *Of his Rights under the Commission.*

It seems to be a general custom, when a bankrupt duly conforms, that the common expenses of maintaining himself and family until he has passed his examination, are to be allowed in his accounts. But a third person will not be allowed to take any of his effects and appropriate it for that purpose<sup>2</sup>.

<sup>1</sup> Sch. and Lef. Rep. 169.

<sup>2</sup> Thompson v. Council, 7 T. R. 157.



By the statute 5 Geo. II. c. 30. s. 7. if a bankrupt surrenders within the time limited by the said act, and in all things conforms as therein directed, he is to be allowed the sum of 5*l.* per cent. out of the neat produce of all the estate that shall be recovered in and received, to be paid to him by the assignees, in case the neat produce of the estate after such allowance made shall be sufficient to pay the creditors who have proved their debts under the commission ten shillings in the pound, so as the 5*l.* per cent. shall not amount to more than 200*l.* And in case the neat produce of the estate shall, over and above the allowance thereafter mentioned, be sufficient to pay the creditors twelve shillings and sixpence in the pound for their respective debts, the bankrupt so conforming shall be allowed 7*l.* 10*s.* per cent. out of such produce, so as the same shall not amount in the whole to above the sum of 250*l.* And in case the neat produce of the estate shall, over and above the allowance thereafter mentioned, be sufficient to pay the creditors fifteen shillings in the pound for their respective debts, the bankrupt so conforming shall be allowed 10*l.* per cent. out of such neat produce, to be paid by the assignees, so as the same shall not amount in the whole to above 300*l.*

But if the neat produce of the bankrupt's estate shall not amount to so much as shall pay all his creditors, who shall have proved their debts under the commission, ten shillings in the pound for their respective debts, after all charges first had and deducted, then such bankrupt shall not be allowed 5*l.* per cent. out of such estate as shall be recovered in, but so much money as the assignees shall think fit to allow him, not exceeding 3*l.* per cent. (sect. 8.)

Until a final dividend is made<sup>1</sup>, and the bankrupt has obtained his certificate<sup>2</sup>, he is not entitled to his allowance.

<sup>1</sup> *Ex parte Stiles and Pickart*, 1 Atk. 203.

<sup>2</sup> *Ex parte Grier*, *Ibid.* 207.

A bankrupt is not entitled to an allowance under a second commission, unless he pays fifteen shillings in the pound <sup>1</sup>.

Partners under a joint commission are not entitled to a double allowance, one in respect of the joint, and the other of the separate estate; but one allowance in respect of their joint and separate effects is to be divided between them, according to the proportions which the surplus of each of their separate estates, after payment of their respective separate debts, and the respective moieties of their joint estate, have contributed to the payment of their joint debts <sup>2</sup>.

If the bankrupt's estate and effects are equal to the payment of twenty shillings in the pound on his debts, he is entitled to the surplus after the expenses of the commission have been discharged; and if the residue and remainder of his debts, after full satisfaction of his creditors, have not been collected in, he may recover and receive the same <sup>3</sup>.

But he is not entitled to any surplus until interest upon all bonds, contracts, or notes carrying interest, or interest allowed by the course of dealing, is first paid out of the estate <sup>4</sup>.

An uncertificated bankrupt may maintain an action of assumpsit against a third person for work and labour <sup>5</sup>; and for work and labour, and materials furnished necessary to his labour <sup>6</sup>.

And where no claim is made by the assignees of a bankrupt for goods acquired, or for money lent and advanced by him after his bankruptcy, he may recover the goods in an action of trover <sup>7</sup>, and the money lent in an action of assumpsit <sup>8</sup>.

<sup>1</sup> *Ex parte Gregg*, 6 Ves. Jun. 238.

<sup>2</sup> *Ex parte Bate*, 1 Bro. C. C. 453.

<sup>3</sup> 13 Eliz. c. 7. s. 4. 1 Jac. I. c. 15. s. 15.

<sup>4</sup> *Bramley v. Goodhere*, 1 Atk. 75.

<sup>5</sup> *Chippendale v. Tomlinson, Cooke*, B. L. 431.

<sup>6</sup> *Silk v. Osborn*, 1 Esp. N. P. C. 140.

<sup>7</sup> *Fowler v. Down*, 1 Bos. and Pul. 44.

<sup>8</sup> *Evans v. Brown*, 1 Esp. N. P. C. 170.

If an uncertificated bankrupt assign after acquired property in trust for a valuable consideration, and a creditor of the bankrupt seize it in execution, the trustee may maintain trover against him<sup>1</sup>.

But if an uncertificated bankrupt carries on trade, either by himself or in partnership, the creditors under the first commission will be entitled to all the property he acquires until he obtains his certificate<sup>2</sup>. And therefore where an uncertificated bankrupt entered into trade in partnership with another person, and a joint commission issued against them, it was decreed that the creditors of the partnership had no equity against the assignees under the first commission, for an account, and application to their debts, of the property used or acquired in that partnership<sup>3</sup>.

*Of the Liability of the Bankrupt on a new Contract or Promise.*

Though a bankrupt is discharged by his certificate from all debts due at the time of the commission, yet he may make himself liable on a new promise, or fresh contract entered into bona fide without fraud or imposition, after an act of bankruptcy, even before<sup>4</sup> or after he has obtained his certificate<sup>5</sup>; and such new contract or promise will be valid and binding, though there should not be any new consideration<sup>6</sup>.

But a promise made by the bankrupt subsequent to obtaining his certificate, will not revive the old debt, if the consideration of the debt is fraudulent; as where the bankrupt promises to pay the creditor a certain sum in consideration that he will not come under the commission<sup>7</sup>; or where the

<sup>1</sup> Laroche v. Wakeman, Peake's N. P. C. 140.

<sup>2</sup> Ex parte Proudfoot, 1 Atk. 251. Ex parte Crew, 16 Ves. Jun. 235.

<sup>3</sup> Everett v. Backhouse, 10 ibid. 94.

<sup>4</sup> Trueman v. Fenton, Comp 544. <sup>5</sup> Ibid.

<sup>6</sup> Cullen, B. L. 386. <sup>7</sup> Colls v. Lovell, 1 Esp. N. P. C. 282.

bankrupt, to induce his creditor to sign a composition deed, gave him a promissory note for the residue of the demand<sup>1</sup>.

### 13. *Of the Certificate.*

#### *Of the Signing of the Certificate.*

By the statute 49 Geo. III. c. 121. s. 18. it is enacted, that “in all cases of commissions of bankrupt heretofore issued, and in which the bankrupts have not obtained their certificates, and in all cases in which commissions of bankrupt shall hereafter be sued forth, the signature and consent of three parts in five in number and value of the creditors of the bankrupt or bankrupts, who shall be creditors for not less than 20*l.* respectively, and who shall have duly proved their debts under the commission, or some other person by them duly authorized thereunto, to the allowance and certificate and discharge of the bankrupt or bankrupts, shall be, to all intents and purposes, as available for the benefit of the bankrupt or bankrupts as before the passing of this act the signature and consent of four parts in five in number and value of such persons would have been available, and such signature and consent of three parts in number and value of such persons shall be sufficient to authorize all acts to be done by the lord chancellor, lord keeper, and lords commissioners of the great seal, and the commissioners in such commissions of bankruptcy, and all others, for the benefit of the bankrupt or bankrupts, which under any prior act or acts of parliament would have been authorized by the signature and consent of four parts in five in number and value of such persons.”

Creditors were formerly entitled to proceed at law for their debts, and to prove under the commission for the purpose of assenting to or dissenting from the certificate. But by

<sup>1</sup> *Cockshott v. Bennet*, 2 T. R. 763.

the fourteenth section of the above statute, a creditor proving a debt under a commission for any purpose whatever, or having a claim of a debt entered upon the proceedings, is to be deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed by him.—

By the statute 5 Geo. II. c. 50. s. 7. if the plaintiff in an action against the bankrupt can prove the certificate was obtained unfairly and by fraud, or that any concealment has been made by the bankrupt to the value of 10*l.*, the certificate will be of no avail to the bankrupt in such action; and by sect. 11. every bond, bill, note, contract, agreement, or other security whatsoever, made or given by any bankrupt, or by any other person, unto or to the use of, or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration, or to the intent to persuade him, her, or them to consent to or sign any allowance or certificate, is void; and the moneys thereby secured, or agreed to be paid, are not recoverable.

Upon this act it has been decided, that an agreement made by the friend of the bankrupt, to induce creditors to sign his certificate, is void<sup>1</sup>; and that if money is actually paid by a third person to induce a creditor to sign a bankrupt's certificate, it may be recovered back in an action for money had and received<sup>2</sup>. If such agreement should be made with the bankrupt's privity before the actual allowance of the certificate, the certificate will be void<sup>3</sup>.

By the 10th section of 5 Geo. II. a bankrupt is not entitled to the benefit of the certificate, unless before its allow-

<sup>1</sup> *Holland v. Palmer*, 1 Bos. and Pul. 95.

<sup>2</sup> *Smith v. Bromley*, Doug. 696.

<sup>3</sup> *Ex parte Butt*, 10 Ves. Jun. 359.



ance he make oath, or, if a Quaker, solemn affirmation, in writing, that such certificate and consent of the creditors thereunto were fairly obtained and without fraud.

By the statute 24 Geo. III. c. 57. s. 9. “ If any person shall fraudulently swear or depose, or, being of the people called Quakers, affirm, before the major part of the commissioners named in any commission of bankruptcy, or by affidavit or affirmation exhibited to them, that a sum of money is due to him or her from any bankrupt or bankrupts, which shall in fact not be really and truly so due or owing; and shall, in respect of such fictitious and pretended debts, sign his or her consent to the certificate for such bankrupt’s discharge from his debts; in every such case, unless such bankrupt shall, before such time as the major part of the said commissioners shall have signed such certificate, by writing by him to be signed and delivered to one or more of the said commissioners, or to one or more of the assignees of his estate and effects under such commissioners, disclose the said fraud, and object to the reality of such debt, such certificate shall be null and void to all intents and purposes, and such bankrupt shall not in that case be entitled to be discharged from his debts, or to have or receive any of the benefits or allowances given or allowed to bankrupts.

### *Of the Effect of the Certificate.*

The certificate of a bankrupt discharges him from all debts proved or proveable under the commission<sup>1</sup>, and that whether joint or separate<sup>2</sup>.

But a bankrupt’s certificate does not discharge him from a debt due to the crown<sup>3</sup>; nor from an express collateral covenant, which does not run with the land<sup>4</sup>; nor from a covenant or agreement for non-payment of rent, or for ar-

<sup>1</sup> 5 Geo. II. c. 30. 46 Geo. III. c. 35. 49 Geo. III. c. 121.

<sup>2</sup> Ex parte Yale, 3 P. Wms. 25.

<sup>3</sup> 1 Atk. 262.

<sup>4</sup> Mayer v. Steward, 4 Bur. 2446.

years accrued since the bankruptcy<sup>1</sup>; nor from an agreement for the support of an illegitimate child<sup>2</sup>.

Neither will the certificate discharge a bankrupt where it is in the power of the creditor to convert his demand into a tort. Thus if a bankrupt, to whom a bill has been delivered for the purpose of remitting the payment, when obtained, to his employer, discounts it at a loss before it is due, and embezzles the money, his certificate will be no bar to an action for the amount<sup>3</sup>.

So if bills are deposited merely as a pledge, if the bankrupt pledges them as his own, he will, notwithstanding his certificate, continue liable for this tort<sup>4</sup>.

Neither is a certificate obtained abroad a bar to an action in this country, although at the time of making the contract the bankrupt resided abroad in the country where he obtained his certificate, if the cause of action accrued here, and was to be executed in this country<sup>5</sup>.

But where the cause of action accrued abroad, and the contract was made there, a certificate obtained in the country in which the cause of action accrued, or the contract was made, will be a bar to any action in this country<sup>6</sup>.

The certificate of a bankrupt partner will not discharge his copartner; but such copartner stands chargeable with and liable to pay the partnership debts, and to perform the joint contracts, as if the bankrupt had not been discharged from them<sup>7</sup>. The certificate, however, of such bankrupt partner will not bar his copartner who has been obliged to pay the partnership debts out of his own estate, from bringing an action against the bankrupt to enforce payment of his proportion, even after he has obtained his certificate<sup>8</sup>.

<sup>1</sup> *Mills v. Auriol*, 4 T. R. 94. *Boot v. Wilson*, 8 East's Rep. 311.

<sup>2</sup> *Miller v. Whittenbury*, 1 Camp. N. P. C. 428.

<sup>3</sup> *Parker v. Norton*, 6 T. R. 695.

<sup>4</sup> *Johnson v. Spiller*, Doug. 167.

<sup>5</sup> *Quin v. Keefe*, 2 Hen. Bl. 553.

<sup>6</sup> *Potter v. Brown*, 5 East's Rep. 124.

<sup>7</sup> 10 Anne, c. 15. s. 3.

<sup>8</sup> *Wright v. Hunter*, 1 East's Rep. 20.

By the statute 5 Geo. II. c. 30. s. 9. if any commission shall issue against any person who has been before discharged by virtue of the act, or compounded with his creditors, or delivered to them his estate or effects, and been released by them, or been discharged by any act for relief of insolvent debtors ; then in either of these cases, the person only of the bankrupt shall be free from arrest, but his future estate and effects shall remain liable to his creditors as before the making of the act (his tools of trade, necessary household goods and furniture, and necessary wearing apparel of himself, his wife, and children, only excepted), unless the estate of such person against whom such commission shall be awarded, shall pay every creditor under the said commission fifteen shillings in the pound.

And it has been decided, that a certificate under a second commission will not protect a bankrupt's future effects, notwithstanding the first may have been superseded, unless fifteen shillings in the pound are paid under the second commission <sup>1</sup>.

But though the future estate of a bankrupt remains liable to the claims of his individual creditors under a second commission not having received fifteen shillings in the pound ; yet that will not prevent the vesting of the bankrupt's estate in the assignees under a third commission, for the benefit of all the creditors <sup>2</sup>.

If a bankrupt obtains his certificate before the bail are fixed, the certificate will discharge them ; but if they are fixed before the certificate is allowed, they will not be discharged ; for the certificate has no operation till it is allowed, and has no relation back <sup>3</sup>.

But bail in error are not entitled to relief, although the

<sup>1</sup> Thornton v. Dallas, Doug. 46.    <sup>2</sup> Hovill v. Browning, 7. East's Rep. 159.

<sup>3</sup> Wooley v. Cobbe, 1 Bur. 244.

bankrupt obtains his certificate pending the writ of error ; for they cannot surrender the principal<sup>1</sup>.

*Of Invalidating the Certificate.*

By the statute 5 Geo. II. c. 30. s. 12. “ if the bankrupt, for or upon the marriage of any of his children, give, advance, or pay above the value of 100*l.* unless he prove, by his books fairly kept, or otherwise on his oath, (or, if a Quaker, on affirmation) before the major part of the commissioners, that he had, at the time thereof, over and above the value so given, advanced, or paid, remaining in goods, wares, debts, ready money, or other estate real or personal, sufficient to pay or satisfy unto each and every person to whom he was any ways indebted their full and entire debts ; or if he has lost in any one day the sum or value of five pounds, or in the whole the sum or value of 100*l.* within the space of twelve months next preceding his becoming bankrupt, in playing at or with cards, dice, tables, tennis, bowls, billiards, shovel-board, or in or by cock-fighting, horse races, dog matches, or foot races, or other pastimes, game or games whatsoever; or in or by bearing a share or part of the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run as aforesaid ; or if within one year before he became bankrupt, he has lost the sum of 100*l.* by one or more contracts for the purchase, sale, refusal, or delivery of any stock of any company or corporation, or any parts or shares of any government or public funds or securities, where every such contract was not to be performed within one week from the time of the making such contract, or where the stock or other thing so bought or sold was not actually transferred or delivered in pursuance of such contract ; the certificate is void.”

<sup>1</sup> Southcote v. Braithwaite, 1 T. R. 621.

But where a bankrupt had given 1000*l.* to his niece upon her marriage, Lord Hardwicke held, that the clause in the act being penal, it ought to be construed strictly, and confined to the children of a bankrupt and no further <sup>1</sup>.

And it has been determined, that insuring in the lottery <sup>2</sup>, or keeping a lottery office <sup>3</sup>, are not within the statute.

*The following having been omitted in its proper place, at the end of page 144, the defect is endeavoured to be remedied by its insertion here.*

### *Of Postliminium.*

Postliminium is that right in virtue of which persons and things taken by the enemy are restored to their former state, when coming again under the power of the nation to which they belonged <sup>4</sup>.

When a power succeeds in conquering a country, or recapturing a vessel, it should seem that, according to the rigour of the law of nations, the reconquered territory or vessel, as well as all property, of whatever description, found therein, ought to return to the original proprietors. And this principle is strictly adhered to with respect to national and immoveable property; for, 1. The national domains return to the sovereign along with the sovereignty, and the sovereign ought, of course, to re-establish the constitution existing previous to the conquest. 2. Such immoveable property belonging to the subjects as has been seized on by the enemy, returns, in virtue of the right of postliminium, to the original proprietors. But, as to moveable property taken in a land war, the right of postliminium ceases when

<sup>1</sup> Ex parte Saumarez, 1 Atk. 86.

<sup>2</sup> Lewis v. Piercy, 1 Hen. Bl. 29.

<sup>3</sup> Ex parte Richardson, Cooke, B. L. 463.

<sup>4</sup> Vatt. b. iii. c. 14. s. 204.



the booty has been twenty-four hours in the hands of the captors. In a maritime war, 1. If the recapture be made by vessels of the state, the recaptured vessels and merchandises return to the original proprietors, after a certain proportionate deduction to defray the expenses of the recapture : 2. If the recapture be made by a privateer, neither vessel nor merchandise returns to the original proprietor ; except, 1. When the recapture is made within twenty-four hours after the capture ; 2. When the capture has been made by pirates ; or, 3. When it has been made against the laws of war in general. The exception does not hold good in the two last cases, unless the recapture is made from the first captors<sup>1</sup>.

Among English subjects the *jus postliminii* continues for ever. By the stat. 43 Geo. III. c. 160. s. 39, when the ships or goods of British subjects are retaken from an enemy, the original owner is entitled to have them restored, upon payment of a stated salvage to the captors ; viz. one-eighth of the value if the recapture is made by any of his majesty's ships ; if by a privateer or other ship, one-sixth ; if by the joint operation of one or more of his majesty's ships, and one or more private ship or ships, then such salvage is to be paid to the recaptors as the judge of the high court of admiralty, or other court having cognizance thereof, shall adjudge fit and reasonable ; unless the ship so retaken shall appear to have been, after the taking thereof, set forth by his majesty's enemies as a ship of war ; in which case she shall be deemed good prize to the captors.

<sup>1</sup> Marten's Law of Nations, 501.

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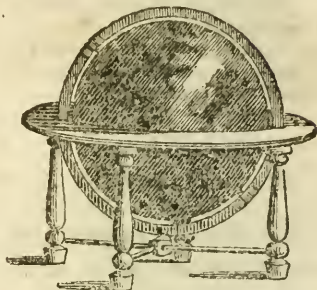
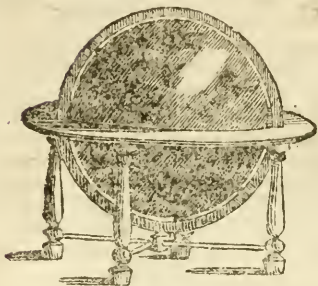
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